DOCKET

No. 07-542

Title: Arizona, Petitioner
v.
Rodney Joseph Gant

Docketed: October 24, 2007
Lower Ct: Supreme Court of Arizona
Case Nos.: (CR-06-0385-PR)
Decision Date: July 25, 2007

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 19 2007	Petition for a writ of certiorari filed. (Response due November 23, 2007)
Nov 19 2007	Brief amicus curiae of Los Angeles County filed.
Nov 21 2007	Motion for leave to file amicus brief filed by National Association of Police Organizations, Inc.
Dec 5 2007	DISTRIBUTED for Conference of January 4, 2008.
Dec 11 2007	Response Requested . (Due January 10, 2008)
Jan 23 2008	Order extending time to file response to petition to and including January 24, 2008.
Jan 24 2008	Brief of respondent Rodney Joseph Gant in opposition filed.
Feb 5 2008	Reply of petitioner Arizona filed. (Distributed)
Feb 6 2008	DISTRIBUTED for Conference of February 22, 2008.
Feb 25 2008	Motion for leave to file amicus brief filed by National Association of Police Organizations, Inc. GRANTED.
Feb 25 2008	Petition GRANTED limited to the following Question: Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?.
Mar 25 2008	Motion for leave to file amici brief filed by Americans for Effective Law Enforcement, et al.
Apr 10 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 12, 2008.
Apr 15 2008	Motion for leave to file amicus brief filed by National Association of Police Organizations, Inc.
May 12 2008	Joint appendix filed. (Statement of costs filed)
May 12 2008	Brief of petitioner Arizona filed.
May 15 2008	Brief amicus curiae of Los Angeles County filed.
May 19 2008	Brief amicus curiae of United States filed
May 19 2008	Brief amici curiae of Florida, et al. filed

Jun 2 2008	Motion for leave to file amicus brief filed by National Association of Police Organizations, Inc. GRANTED.
Jun 2 2008	Motion for leave to file amici brief filed by Americans for Effective Law Enforcement, et al. GRANTED.
Jun 4 2008	The time to file respondent's brief on the merits is further extended to and including July 18, 2008.
Jun 9 2008	SET FOR ARGUMENT ON Tuesday, October 7, 2008.
Jul 3 2008	CIRCULATED
Jul 17 2008	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the respondent.
Jul 18 2008	Brief of respondent Rodney Joseph Gant filed. (Distributed)
Jul 22 2008	Brief amici curiae of ACLU and the ACLU of Arizona filed. (Distributed)
Jul 25 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 25 2008	Brief amicus curiae of National Association of Criminal Defense Laywers filed. (Distributed)
Jul 25 2008	Brief amicus curiae of National Association of Federal Defenders filed. (Distributed)
Aug 7 2008	Application (08A115) for an extension of time to file petitioner's reply brief on the merits to and including September 2, 2008, submitted to Justice Kennedy.
Aug 11 2008	Application (08A115) granted by Justice Kennedy for an extension of time to file petitioner's reply brief on the merits to and including September 2, 2008.
Aug 26 2008	Record received from the Supreme Court of Arizona. (1 box) (There are sealed documetns in this record)
Sep 2 2008	Reply of petitioner Arizona filed. (Distributed)
Sep 5 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 7 2008	Argued. For petitioner: Joseph T. Maziarz, Assistant Attorney General, Phoenix, Ariz.; and Anthony Yang, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Thomas F. Jacobs, Tucson, Ariz.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

vs.

RODNEY JOSEPH GANT,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *New York v. Belton*, 453 U.S. 454 (1981), this Court held that the risks to officer safety and to the preservation of evidence inherent in the arrest of a vehicle's recent occupant justify a contemporaneous warrantless search of the automobile's passenger compartment incident to the arrest. The question presented is:

Did the Arizona Supreme Court effectively "overrule" this Court's bright-line rule in *Belton* by requiring in each case that the State prove after-the-fact that those inherent dangers actually existed at the time of the search?

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PETITION FOR WRIT OF CERTIORARI

The State of Arizona respectfully petitions for a writ of certiorari to review the Arizona Supreme Court's July 25, 2007, opinion holding that whether police may search the passenger compartment of an automobile incident to the arrest of the automobile's recent occupant depends on a case-by-case assessment of the circumstances of the arrest.

OPINIONS BELOW

The Arizona Supreme Court's opinion is reported as *State v. Gant*, 216 Ariz. 1, 162 P.3d 640 (2007). Petitioner's Appendix ("Pet. App.") A. The Arizona Court of Appeals' opinion is reported as *State v. Gant*, 213 Ariz. 446, 143 P.3d 379 (App. 2006), *vacated*, 216 Ariz. 1, 162 P.3d 640 (2007). Pet. App. B. The order of the Superior Court of Arizona in and for the County of Pima dated December 4, 2007, denying the motion to suppress is unpublished. Pet. App. C.

STATEMENT OF JURISDICTION

The Arizona Supreme Court entered the judgment from which relief is sought on July 25, 2007. Pet. App. A. Petitioner timely filed this petition for writ of certiorari within ninety days of the order denying review. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In this case the Arizona Supreme Court misconstrued *New York v. Belton*, 453 U.S. 454 (1981), and *Thornton v. United States*, 541 U.S. 615 (2004), by imposing a retrospective, case-by-case assessment of actual risks to officer safety and evidence preservation at the time of an automobile search incident to arrest, rather than applying *Belton*'s bright-line rule that a recent occupant's arrest, without more, justifies a contemporaneous warrantless search of the automobile's passenger compartment incident to the arrest. The *Gant* decision directly contradicts this Court's precedents, conflicts with the decisions of nearly all federal circuit courts and state courts, and imposes an unworkable case-by-case test that will hinder the police in conducting arrests and searches safely and consistently. This Court should grant certiorari, reverse the Arizona Supreme Court's decision, and reaffirm *Belton*'s bright-line rule.

A. Material Facts.

On August 25, 1999, two Tucson, Arizona, police officers went to a house suspected of being used for narcotics activity. Pet. App. A at 2, ¶ 2. One officer knocked on the door, and Respondent Rodney Gant answered. *Id.* The officers asked to speak with the homeowner, but Gant told them that the owner was not at home and would not return until later that day. *Id.* Gant gave the officers information

about his identity. Pet. App. C at 2. The officers left and ran a records check on Gant and discovered that his license was suspended and that he had an outstanding warrant for driving with a suspended license. Pet. App. A at 2, ¶ 2.

The officers returned to the house that evening. *Id.* at 2, ¶ 3. They found two individuals outside the house and, after investigation, arrested them. *Id.*; Pet. App. C at 2. While the officers were handcuffing the individuals and placing them in patrol cars, Gant drove up in his car and parked in the driveway. Pet. App. A at 2-3, ¶ 3. One officer summoned Gant as he got out of his car, and Gant walked approximately eight to twelve feet toward the officer. *Id.* The officer told Gant that he was under arrest for driving with a suspended license and handcuffed him. *Id.*; Pet. App. C at 3. The officer placed Gant in a patrol car. Pet. App. A at 3, ¶ 3.

Officers then searched the passenger compartment of Gant's car and found a handgun and a plastic baggie containing cocaine. *Id.* at 3, ¶ 4. Gant was subsequently charged with one count of possession of a narcotic drug for sale and one count of possession of drug paraphernalia. *Id.*

B. Proceedings Below.

On a stipulated record before trial, Gant unsuccessfully moved to suppress the fruits of the search. Pet. App. A at 3, ¶ 5; *State v. Gant*, 43 P.3d 188, 191, ¶ 4 (Ariz. App. 2002), *vacated, Arizona v. Gant*, 540 U.S. 963 (2003). On appeal from his ensuing convictions, the Arizona Court of Appeals held that the evidence should have been suppressed because the police had not initiated contact with Gant before he stepped out of his car. *Gant*, 43 P.3d at 194, ¶¶ 15, 18. The Arizona Supreme Court denied

review, and the State petitioned this Court for a writ of certiorari, contending that under *Belton* an arrestee's recent occupancy of the automobile, not the arrestee's "initial contact" with the police, is the sole constitutional prerequisite to a warrantless search of the arrestee's automobile incident to arrest. This Court granted certiorari, vacated the court of appeals' opinion, and remanded the case to that court to reconsider its decision in light of the Arizona Supreme Court's opinion in *State v. Dean*, 76 P.3d 429 (Ariz. 2003). *Gant*, 540 U.S. at 963. In *Dean*, issued during the pendency of the certiorari proceedings, the Arizona Supreme Court expressly rejected the initial-contact rule and appeared to have adopted, without qualification, the recent-occupancy test. 76 P.3d at 437, ¶¶ 32–34. The court held, consistent with *Belton*, that Dean was not a recent occupant of his automobile at the time of arrest because he was not arrested until more than two hours after he had run from the automobile and had hidden in a house. *Id.*

In the instant case, on remand from this Court, the Arizona Court of Appeals ordered an evidentiary hearing to further develop the factual record. Pet. App. A at 4, ¶ 6. Based on uncontroverted testimony at the hearing, the trial court held that the search of Gant's car was a valid warrantless search incident to arrest because Gant was a recent occupant of the automobile at the time of arrest and the search was contemporaneous with the arrest. Pet. App. C at 5. The trial court found that the officers had contacted Gant immediately after he had gotten out of his car and had arrested him "seconds later." *Id.* The officers had searched Gant's car "immediately" after he was handcuffed and placed in a patrol car. *Id.*

Gant appealed, and the court of appeals again reversed, finding that the search was not incident to Gant's arrest because it was not contemporaneous with the arrest and did not satisfy the rationales set forth in *Chimel v. California*, 395 U.S. 752 (1969) (stating that a search incident to arrest includes the area within the arrestee's immediate control to ensure officer safety and to preserve evidence). Pet. App. A at 4, ¶ 6; Pet. App. B at 15, ¶ 18.

The Arizona Supreme Court granted the State's petition for review of that decision and vacated the court of appeals' opinion by a 3-2 vote, but held that the search of the passenger compartment of Gant's car violated the Fourth Amendment.[1] Pet. App. A at 4, ¶ 7; *id.* at 15, ¶ 25. The majority began its analysis with *Chimel*, recognizing that the need to protect officer safety and to preserve evidence provided the justifications for the search-incident-to-arrest exception to the warrant requirement. *Id.* at 5, ¶ 9. Because of these justifications, the majority believed that this Court in *Chimel* had limited the permissible scope of a search incident to arrest to the "arrestee's person and the area within his immediate control—that is, the area from which he might gain possession of a weapon or destructible evidence." *Id.* at 5, ¶ 9 (quoting *Chimel*, 395 U.S. at 763) (internal quotation marks omitted). The majority then explained that in *Belton*, this Court had applied *Chimel* to instances in which the arrestee was a recent occupant of a car and had established a "bright-line rule" that the area under the arrestee's immediate control

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[1] Gant made no claim under the Arizona Constitution, and the supreme court declined to consider its application to Gant's case. Pet. App. A at 4, ¶ 8 n.1.

included the car's passenger compartment and any containers therein. Pet. App. A at 6, ¶ 11.

The majority stated that although this Court established a "bright-line rule" in *Belton*, it never addressed whether the police may still search the passenger compartment "at all once the scene is secure." *Id.* at 6, ¶ 12. The majority examined the factual circumstances of Gant's arrest and ruled that the need to protect the arresting officers' safety and the need to preserve any evidence in Gant's car from destruction did not justify the search of the passenger compartment incident to arrest because the police had handcuffed Gant and placed him a patrol car, had handcuffed and had placed in patrol cars other persons at Gant's house, and had had four other officers present at the scene. *Id.* at 7, ¶ 13. The majority concluded that "[a]bsent either of these *Chimel* rationales, the search cannot be upheld as a lawful search incident to arrest." *Id.* (footnote omitted).

The majority admitted that "[i]t is possible to read *Belton*, as the State and the Dissent do, as holding that because the interior of a car is generally within the reach of a recent occupant, the *Belton* bright-line rule eliminates the requirement that the police assess the exigencies of the situation." *Id.* at 8, ¶ 15. The majority also rejected the State's argument that this Court had reaffirmed this interpretation of *Belton* in *Thornton*, which was factually indistinguishable from Gant's case. *Id.* at 9, ¶ 18. The majority conceded that "the facts in *Thornton* resemble those in the case before us," but it nevertheless dismissed *Thornton*. *Id.* at 10, ¶ 19. The majority stated that the issue before this Court in *Thornton* was not whether the circumstances of Thornton's arrest justified a search

incident to arrest, but whether Thornton was a recent occupant of his car even though he had just exited the car before the police arrested him. *Id.* The majority admitted, however, that "[w]e are aware that most other courts presented with similar factual situations have found *Belton* and *Thornton* dispositive of the question whether a search like the one at issue was incident to arrest." *Id.* at 11, ¶ 21.

The dissenting justices criticized the majority for "effectively rewrit[ing] *Belton*," *id.* at 18, ¶ 34, "the sole prerogative of the [United States] Supreme Court," *id.* at 15-16, ¶ 27, and opined that the majority's "approach is at odds with the core premise of *Belton*": the need for a clear rule "that does not depend on case-by-case adjudication," *id.* at 20, ¶ 39. Noting also the inconsistency between the majority's focus on the level of risk at the time of the search and *Belton*'s reasoning that the arrest itself justifies the search, the dissent explained that

> the validity of the search does not depend on particularized concerns for officer safety or preservation of evidence at the time of the search. . . .
>
> . . . *Belton* implies that warrantless searches may be conducted even when the arrestee has been handcuffed and locked in a patrol car.

Id. at 19, ¶¶ 36–37. The dissent noted that in *Belton* the Court did not consider whether the exigencies inherent in Belton's arrest continued to exist at the time of the search, *id.* at 18, ¶ 35, and stated that "the post-arrest search in *Belton* was justified because it was incidental to the arrest, not because other exigencies were present," *id.* at 20, ¶ 38.

Because the dissent believed that *Belton* permitted the search of an automobile's passenger compartment as part of a search incident to the arrest of the driver regardless of the existence of any exigencies, it found that the search of Gant's automobile comported with the Fourth Amendment. *Id.* at 23, ¶ 43.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Arizona Supreme Court's decision in *State v. Gant* contradicts and effectively "overrules" this Court's holdings in *New York v. Belton* and *Thornton v. United States* and also conflicts with the holdings of nearly every state and federal court that has applied *Belton* and *Thornton* to factual situations like Gant's. The *Gant* court's fact-bound analysis of the degree of actual danger to police officers and actual potential for destruction of evidence in Gant's particular case is inconsistent with the bright-line rule established in *Belton*—and followed in *Thornton*—that a recent occupant's custodial arrest, without more, justifies a contemporaneous warrantless search of the automobile's passenger compartment incident to arrest.

The *Gant* majority's case-specific assessment of actual risks to officers and evidence not only contradicts this Court's precedents and conflicts with the decisions of nearly every court that has applied this Court's precedents to facts similar to Gant's, it is also unworkable for the very reasons that this Court has repeatedly cited in support of a bright-line rule. Fourth Amendment rules "'ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged'" and should not turn upon

"'[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions.'" *Belton*, 453 U.S. at 458 (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. Ct. Rev. 127, 142); *see also Thornton*, 541 U.S. at 623 (rejecting "subjective and highly fact-specific" assessments "that would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts that *Belton* sought to avoid").

This Court sought to articulate in *Belton* a "straightforward rule, easily applied, and predictably enforced." 453 U.S. at 459. The *Gant* decision thwarts those objectives and stands in direct conflict with this Court's interpretations of the Fourth Amendment. This case presents a single question that demands an answer: whether the *Belton* rule means what it says:

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

453 U.S. at 460.

The *Gant* decision has no precedential support, declares an unworkable and dangerous test, and directly contradicts this Court's interpretations of the Fourth Amendment. This Court should grant certiorari, reverse the Arizona Supreme Court's decision, and reaffirm the bright-line *Belton/Thornton* rule.

I. The Arizona Supreme Court's Decision Directly Conflicts with—Indeed, Effectively "Overrules"—*New York v. Belton*.

The *Gant* majority opinion--holding that the constitutionality of a search incident to arrest under *Belton* depends on a factual assessment in every case whether the justifications underlying the search incident to arrest actually exist—directly contradicts this Court's precedents. In *Belton*, this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460. Thus, the arrest itself is the triggering mechanism of an automobile search incident to arrest, not any particular level of risk that may actually exist in an individual case. *See United States v. Robinson*, 414 U.S. 218, 235 (1973) ("It is the fact of the lawful arrest which establishes the authority to search."). *Belton* established an objective bright-line rule that should be applied in a simple and straightforward fashion, regardless of the particular level of danger that an appellate court might in hindsight ascribe to a particular set of facts. *See Belton*, 453 U.S. 458–59 (seeking to articulate a "straightforward rule, easily applied, and predictably enforced"); *see also Michigan v. Long*, 463 U.S. 1032, 1049 n.14 (1983) (stating that "the 'bright line' that we drew in *Belton* clearly authorizes [a search of an automobile] *whenever* officers effect a custodial arrest") (emphasis added).

Contrary to this bright-line rule, the *Gant* majority applied a fact-bound analysis whether, in the majority's after-the-fact opinion, the arrest scene was sufficiently

secure that the justifications underlying the search-incident exception did not actually exist. The *Gant* majority relied on multiple factors in making its determination that the justifications for a search incident to arrest did not exist: (1) Gant was handcuffed, (2) Gant was placed in a patrol car, (3) a police officer "supervised" Gant's presence in the patrol car, (4) the only two other individuals at the scene had been handcuffed and placed in separate patrol cars, (5) four police officers were at the scene, and (6) one officer believed that the scene was "secure." Pet. App. A at 7, ¶ 13. The *Gant* majority found *Belton* no impediment to its analysis because in its view, *Belton* did nothing more than hold that a passenger compartment was within an arrestee's immediate area of control subject to search *if* the arrestee posed a danger to the arresting officer or to the preservation of evidence. *Id.* at 5, ¶ 11.

The *Gant* majority's peculiar view of *Belton* directly contradicts *Belton*'s language and spirit. In *Belton*, this Court cited with approval its earlier express rejection of "the suggestion that 'there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search . . . incident to arrest.'" 453 U.S. at 459 (quoting *Robinson*, 414 U.S. at 235). This Court stated in *Robinson* that the Fourth Amendment did not require such a case-by-case assessment:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that

> weapons or evidence would in fact be found upon the person of the suspect. . . . [A] search incident to the arrest requires no additional justification. . . .
>
> . . . Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [defendant] or that he did not himself suspect that [the defendant] was armed.

414 U.S. at 235–36. The *Gant* majority ignores this Court's rejection of a case-by-case assessment.

The *Gant* majority's case-by-case analysis is the same analysis that this Court rejected in *Belton*. The majority of the New York Court of Appeals had declared in Belton's case that "'[a] warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article.'" *Belton*, 453 U.S. at 456 (quoting *People v. Belton*, 407 N.E.2d 420, 421 (N.Y. 1980)). Although the New York court's majority reasoned that the evidence in Belton's jacket was no longer vulnerable to destruction once the police officer had gained "exclusive control" of it, the underlying notion was the same: when police have secured the scene, the dangers presumed inherent in automobile searches incident to arrest no longer exist. *Belton*, 453 U.S. at 461 n.5.

Justice Brennan's dissent in *Belton* makes clear that the entire Court understood that the new "bright-line rule" foreclosed case-by-case analysis, thereby enabling police to secure the arrestee before searching the automobile:

"[T]he Court for the first time grants police officers authority to conduct a warrantless 'area' search under circumstances where there is no chance that the arrestee 'might gain possession of a weapon or destructible evidence.'" 453 U.S. at 468–69 (Brennan, J., dissenting) (quoting *Chimel*, 395 U.S. at 763).

This Court reiterated its understanding of *Belton* in *Thornton*. In that case, which was nearly identical to Gant's case, a police officer discovered that the license tag on Thornton's automobile did not match the automobile. 541 U.S. at 618. Before the officer could stop Thornton's automobile, Thornton parked it and walked away. *Id.* The officer approached Thornton, questioned him about the license tag, and found cocaine on him after a pat-down search. *Id.* After the officer arrested Thornton, handcuffed him, and placed him in the patrol car, the officer searched the passenger compartment of Thornton's automobile under *Belton* and found a handgun. *Id.*

Thornton claimed that the search violated *Belton* because he was not an "occupant" of his automobile when arrested and could not gain access to the handgun in the passenger compartment. *Id.* at 617, 622 & n.2. This Court held that the police may search the passenger compartment of an arrestee's automobile as long as the arrestee was a "recent occupant." *Id.* at 623–24. In response to Thornton's argument that *Belton* should not apply to persons arrested outside an automobile because they cannot reach the passenger compartment to grab a weapon or to destroy evidence, this Court noted that "the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in *Belton*." *Id.* at 622. This Court

reaffirmed that the *Belton* rule applies regardless whether the arrestee could gain access to the passenger compartment:

> The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.

Id. at 622–23.

Despite the unanimous understanding of *Belton*'s meaning—and its reaffirmation in *Thornton* under facts nearly identical to those in Gant's case—the *Gant* majority has refused to follow this Court's precedents. This Court's decision in *Belton* has indeed come under criticism. *See Thornton*, 541 U.S. at 624 (O'Connor, J., concurring) (referring to "*Belton*'s shaky foundation"); *id.* at 625–32 (Scalia, J., concurring in the judgment) (urging a reevaluation of *Belton*'s doctrinal underpinnings). But overruling binding precedent is "*this* Court's prerogative *alone*." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (emphasis added). This is true even where "'changes in judicial doctrine' ha[ve] significantly undermined" precedent. *United States v. Hatter*, 532 U.S. 557, 567 (2001) (quoting *Hatter v. United States*, 64 F.3d 647, 650 (Fed. Cir. 1995). "If a precedent of this Court has direct application in a case, yet appears to rest on reasons

rejected in some other line of decisions," a lower court "should follow the case which directly controls." *Rodriguez de Quijas v. Shearson/Am. Express*, 490 S. Ct. 477, 484 (1989). The *Gant* majority has flouted this precept.

II. The Arizona Supreme Court's Decision Directly Conflicts with Numerous Decisions of the Federal Courts of Appeals and State Supreme Courts.

The *Gant* majority, by its own admission, stands alone among federal and state appellate courts in holding that this Court did not establish a bright-line rule in *Belton* that police may search the passenger compartment of an arrestee's automobile regardless whether the police have secured the arrestee: "We are aware that most other courts presented with similar factual situations [to Gant's] have found *Belton* and *Thornton* dispositive." Pet. App. A at 11, ¶ 21.

In this statement, the *Gant* majority is correct. Federal Courts of Appeals that have considered whether handcuffing and securing an arrestee in a patrol car affects the validity of a search of the passenger compartment of the arrestee's automobile incident to his arrest have held that a search is valid under *Belton* regardless whether the arrestee is handcuffed or secured in a patrol car. *E.g.*, *United States v. Barnes*, 374 F.3d 601, 604 (8th Cir. 2004) ("The lawfulness of the search does not depend on whether the occupant was *actually capable* of reaching the area during the course of the police encounter. *Belton*'s bright-line rule did away with that fact-specific inquiry into reachability."); *Northrop v. Trippett*, 265 F.3d 372, 379 (6th Cir. 2001) ("So long as the defendant had the item within

his immediate control near the time of the arrest, the item remains subject to a search incident to an arrest."); *United States v. White*, 871 F.2d 41, 44 (6th Cir. 1989) ("[E]ven after the arrestee has been separated from his vehicle and is no longer within reach of the vehicle or its contents, the *Belton* rule . . . applies, and such a search is valid."); *United States v. Karlin*, 852 F.2d 968, 972 (7th Cir. 1988) (search incident to arrest upheld where defendant was arrested, handcuffed, patted down, and placed in squad car); *United States v. McCrady*, 774 F.2d 868, 872 (8th Cir. 1985) (search of locked glove compartment after defendant arrested and placed in patrol car upheld as search incident to arrest); *United States v. Cotton*, 751 F.2d 1146, 1148 (10th Cir. 1985) (*Belton* does not require arresting officer to undergo a detailed analysis at the time of arrest whether the handcuffed arrestee could reach into the car to seize an item within it.).[2]

The same is true of state supreme courts. *See State v. Wheaton*, 825 P.2d 501, 503 (Idaho 1992) (search of car incident to arrest upheld where defendant had been arrested, handcuffed, and placed in patrol car); *Rainey v. Commonwealth*, 197 S.W.3d 89, 95 (Ky. 2006) (affirming *Belton* search when the defendant "was so far from his

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[2] Federal Courts of Appeals have also upheld searches under *Belton* in situations in which the arrestee has been handcuffed and placed in a patrol car without specifically addressing the issue. *See United States v. Mapp*, 476 F.3d 1012, 1014 (D.C. Cir. 2007) (upholding search of arrestee's car conducted after he had been handcuffed and placed in patrol car); *United States v. Hrasky*, 453 F.3d 1099, 1100, 1103 (8th Cir. 2006) (same); *United States v. Weaver*, 433 F.3d 1104, 1107 (9th Cir. 2006) (same); *United States v. Osife*, 398 F.3d 1143, 1144, 1146 (9th Cir. 2005) (same); *United States v. Herndon*, 393 F.3d 665, 668 (6th Cir.) (same), *vacated on other grounds*, 544 U.S. 1029 (2005).

vehicle that it was unlikely that he could have accessed it"); *State v. Hensel*, 417 N.W.2d 849, 852–53 (N.D. 1988) (search of automobile conducted after defendant was arrested, handcuffed, and placed in police car was valid search incident to arrest); *State v. Fladebo*, 779 P.2d 707, 712 (Wash. 1989) (during arrest process, even after suspect is arrested, handcuffed, and placed in patrol car, officers may search passenger compartment of automobile for destructible evidence or weapons); *Vasquez v. State*, 990 P.2d 476, 482 (Wyo. 1999) (*Belton* search proper "although Vasquez had been removed from the vehicle, handcuffed, and placed in a patrol car").

In the face of this overwhelming authority, the *Gant* majority takes solace that decisions of two other courts have invalidated searches under circumstances similar to Gant's. Pet. App. A at 12, ¶ 21 n.4. But those decisions do not even address *Belton*. The first decision makes no mention of *Belton* at all, even though *Belton* had been on the books for fourteen years. *Ferrell v. State*, 649 So. 2d 831 (Miss. 1995). Instead, the court relied on an inapposite pre-*Belton* decision. *Id.* at 833 (citing *Cupp v. Murphy*, 412 U.S. 291 (1973)). The second decision does not mention *Belton* either. *State v. Greenwald*, 858 P.2d 36 (Nev. 1993). Only the dissenting justice discussed *Belton* and concluded that the search of the arrestee's car was valid. *Id.* at 41 (Steffen, J., dissenting).

The *Gant* majority's reliance on decisions that do not cite this Court's controlling authority suggests studied avoidance of the applicable law. The *Gant* majority decision defies the applicable law—this Court's decisions in *Belton* and *Thornton*—that nearly all federal and state appellate courts have recognized.

III. The Arizona Supreme Court's Decision Requires a Case–By–Case Analysis that Is Antithetical to the Goals that This Court Achieved by Establishing *Belton*'s Bright-Line Rule.

The *Gant* majority requires police to engage in a case-by-case analysis of the circumstances of every arrest of a recent occupant of an automobile to determine whether the circumstances justify searching the passenger compartment of the automobile as part of the search incident to arrest. Such a case-by-case assessment of the facts creates uncertainty and inconsistency in applying the search-incident-to-arrest exception to the warrant requirement and inhibits police from conducting arrests and searches safely in these cases. These are the very evils that this Court alleviated by establishing a workable bright-line rule in *Belton*.

This Court's holding in *Chimel*—that police may search incident to arrest the area within the arrestee's immediate control—left lower courts in disarray when applying it to cases in which the arrestee was a recent occupant of an automobile. *Belton*, 453 U.S. at 459. Lower courts had found no workable definition of the area within the arrestee's immediate control "when that area arguably includes the interior of an automobile and the arrestee is its recent occupant." *Id.* at 460. Many courts had struggled with the recurring question "whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile after the arrestees are no longer in it." *Id.* at 459.

This Court resolved these questions sensibly in *Belton*. This Court noted that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Id.* at 460 (quoting *Chimel*, 395 U.S. at 763). Applying *Chimel* "in light of that generalization," this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.*

This bright-line rule makes sense. It is clear and simple. This Court established the rule to articulate "'[a] single, familiar standard'" "'to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *Id.* at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979)). Fourth Amendment rules "'ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged'" and should not turn upon "'[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions.'" *Belton*, 453 U.S. at 458 (quoting LaFave, 1974 S. Ct. Rev. at 142). The Fourth Amendment "has to be applied on the spur (and in the heat) of the moment," *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001), and requires standards that are "sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made," *id.* Police have an "essential interest"

in "readily administrable rules." *Id. Belton*'s bright-line rule clearly informs police officers what is reasonable under the Fourth Amendment when they arrest a recent occupant of an automobile: they may search the automobile's passenger compartment incident to the arrest.

The *Belton* rule is not only clear and simple to apply, but also respectful of the need to protect officer safety in the field and to preserve any evidence from destruction. Arrests, especially arrests of recent occupants of automobiles, are dangerous to police officers. *See Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (arresting automobile occupants presents "inordinate risks" for officers); *Robinson*, 414 U.S. at 234 n.5 ("The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty."). The *Belton* rule allows police officers first to arrest and secure the occupant, and then to search the passenger compartment of the automobile. The decision to arrest and to search incident to that arrest is "necessarily a quick ad hoc judgment." *Robinson*, 414 U.S. at 235. Every arrest situation is unique, presenting a myriad of variable and often unpredictable circumstances, and officers cannot engage in a detailed *Chimel* analysis at the time of arrest to determine whether the arrestee could reach a weapon or evidence in the automobile. Custodial arrests are dangerous, and "police must act decisively and cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp." *United States v. Lyons*, 706 F.2d 321, 330 (D.C. Cir. 1983). Although in a given case a weapon or evidence may not be accessible to the arrestee, this Court recognized in *Thornton* that "[t]he need for a clear rule . . . justifies the

sort of generalization which *Belton* enunciated." 541 U.S. at 622–23.

The *Belton* rule strikes the right balance between the need to protect police officers and to preserve evidence in inherently dangerous situations, and the need to respect the individual's right to be free from unreasonable searches. It is "too plain for argument" that the State's interest in officer safety is "both legitimate and weighty." *Mimms*, 434 U.S. at 110. And an individual has a lesser expectation of privacy in the contents of his automobile. *See Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (car searches intrude much less upon personal privacy and dignity than searches of persons, in light of the everyday exposure of automobiles and their contents to public view, police regulation, and potential involvement in traffic accidents); *California v. Carney*, 471 U.S. 386, 390–92 (1985) ("ready mobility" and pervasive regulation result in a reduced expectation of privacy in motor vehicles); *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (car searches are "far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building"). The reduced expectation of privacy in an automobile is "diminished further when the occupants are placed under custodial arrest." *Robbins v. California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring) (citations omitted), *overruled on other grounds by United States v. Ross*, 456 U.S. 798 (1982).

In contrast to the *Belton* rule, the *Gant* majority's case-by-case approach gives police no guidance and prevents them from safely conducting an arrest of a recent occupant of an automobile. Because every arrest situation is different and the validity of a search of an automobile's

passenger compartment incident to the occupant's arrest depends on its peculiar facts, police have no guidance to determine when a search is permissible and when it is not:

> [T]he protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."

Belton, 453 U.S. at 458 (quoting LaFave, 1974 S. Ct. Rev. at 142). If police officers must engage in a *Chimel* analysis in every arrest before deciding whether to search the automobile's passenger compartment, this Court's "preference for a straightforward rule for guidance of police officers and avoidance of hindsight determinations in litigation would be frustrated." *Karlin*, 852 F.2d at 971.

The *Gant* majority's case-by-case approach also inhibits police from taking appropriate measures to protect themselves and to preserve any evidence of crime. The *Gant* majority presumes that the police are safe once they have handcuffed the arrestee and placed him in a patrol car. But no procedure eliminates the danger inherent in an arrest. Even arrestees secured in a patrol car, as Thornton and Gant were, can escape and threaten officers or destroy evidence. *See, e.g., Plakas v. Drinski*, 19 F.3d 1143, 1144–45 (7th Cir. 1994) (suspect handcuffed in back seat of squad car escaped from squad car and later confronted police); *United States v. Sanders*, 994 F.2d 200, 210 & n.60 (5th Cir. 1993) (citing incidents in which handcuffed

arrestees killed police officers).[3] Although the *Gant* majority found that the officers arresting Gant were safe once Gant was handcuffed and inside a patrol car, "[p]ersons under stress may attempt actions unlikely to succeed." *United States v. McConney*, 728 F.2d 1195, 1207 (9th Cir. 1984) (holding that presence of several agents with guns drawn on arrestee "was no guarantee that armed violence could not break out when a loaded gun was only two feet away").

The *Gant* majority's case-by-case approach is detrimental to the goals that this Court sought to achieve by establishing a bright-line rule in *Belton* and directly contradicts *Belton* and *Thornton*. This Court should reverse the *Gant* opinion and reaffirm *Belton*'s bright-line rule.

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[3] Indeed, three weeks after the *Gant* majority discounted these risks, an arrestee in Tucson, Arizona, locked in the back of a patrol car, "slipped his handcuffed hands in front of him, broke open [the] patrol car's window and ran away." Dale Quinn, "*Police Recapture Arrestee Who Escaped From Squad Car*," ARIZ. DAILY STAR, Aug. 17, 2007, at B1.

CONCLUSION

For these reasons, the State of Arizona respectfully requests that this Court grant certiorari, reverse the *Gant* opinion, and hold that the search of Gant's car incident to his arrest was constitutional under *Belton* and *Thornton*.

Respectfully submitted,

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APPENDIX A

162 P.3d 640
216 Ariz. 1

Supreme Court of Arizona.
STATE of Arizona, Appellee,
v.
Rodney Joseph GANT, Appellant.
No. CR-06-0385-PR.

July 25, 2007.

Background: Defendant was convicted in the Superior Court, Pima County, No. CR-20000042,Clark W. Munger, J., of unlawful possession of cocaine for sale and unlawful possession of drug paraphernalia. Defendant appealed. The Court of Appeals, 202 Ariz. 240, 43 P.3d 188, reversed. The United States Supreme Court granted state's petition for certiorari, and subsequently vacated and remanded. The Court of Appeals remanded for evidentiary hearing on legality of warrantless search. On remand, the Superior Court, Pima County, No. CR-20000042, Barbara C. Sattler, Judge Pro Tempore, found no violation. Defendant appealed. The Court of Appeals, 213 Ariz. 446, 143 P.3d 379, reversed.

Holding: On grant of state's petition for review, the Supreme Court, Berch, V.C.J., held that officers' warrantless search of defendant's vehicle was not justified by search incident to arrest exception to the Fourth Amendment's warrant requirement.

[Headnotes omitted]

Judgment of the Superior Court reversed; judgment of Court of Appeals affirmed; opinion of Court of Appeals vacated.

Bales, J., dissented and filed a separate opinion.

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OPINION

BERCH, Vice Chief Justice.

¶ 1 This case requires us to determine whether the search incident to arrest exception to the Fourth Amendment's warrant requirement permits the warrantless search of an arrestee's car when the scene is secure and the arrestee is handcuffed, seated in the back of a patrol car, and under the supervision of a police officer. We hold that in such circumstances, a warrantless search is not justified.

I. FACTS AND PROCEDURAL BACKGROUND

¶ 2 On August 25, 1999, two uniformed Tucson police officers went to a house after receiving a tip of narcotics activity there. When Defendant Rodney Gant answered the door, the officers asked to speak with the owner of the residence. Gant informed the officers that the owner was not home, but would return later that afternoon. After leaving the residence, the officers ran a records check and discovered that Gant had a suspended driver's license and an outstanding warrant for driving with a suspended license.

¶ 3 The officers returned to the house later that evening. While they were there, Gant drove up and parked his car

in the driveway. As he got out of his car, an officer summoned him. Gant walked eight to twelve feet toward the officer, who immediately arrested and handcuffed him. Within minutes, Gant had been locked in the back of a patrol car, where he remained under the supervision of an officer. At least four officers were at the residence by this time and the scene was secure. Two other arrestees had already been handcuffed and locked in the back of separate patrol cars and there were no other people around.

¶ 4 After Gant had been locked in the patrol car, two officers searched the passenger compartment of his car and found a weapon and a plastic baggie containing cocaine. Gant was charged with one count of possession of a narcotic drug for sale and one count of possession of drug paraphernalia for the baggie that held the drug.

¶ 5 Gant filed a motion to suppress the evidence seized from his car, which the superior court denied. Gant was convicted of both charges and appealed. The court of appeals held that the evidence should have been suppressed and therefore reversed Gant's convictions. *State v. Gant*, 202 Ariz. 240, 246, ¶ 18, 43 P.3d 188, 194 (App.2002). After this Court denied review, the State petitioned the United States Supreme Court for certiorari. The Supreme Court granted the petition, vacated the court of appeals' opinion, and remanded to that court to reconsider its opinion in light of this Court's opinion in *State v. Dean*, 206 Ariz. 158, 76 P.3d 429 (2003). *Arizona v. Gant*, 540 U.S. 963, 124 S.Ct. 461, 157 L.Ed.2d 308 (2003). In *Dean*, we held that when an arrestee is not a recent occupant of his vehicle at the time of the arrest, the reasons supporting a "warrantless search of the vehicle—protection of the arresting officers and preservation of evidence"—no longer justify the search and therefore the police must obtain a warrant. 206 Ariz. at 166, ¶ ¶ 32-34, 76 P.3d at 437.

¶ 6 Following the Supreme Court's remand, the court of appeals remanded Gant's case to the trial court to determine whether Gant was a recent occupant of his car when he was arrested. After an evidentiary hearing, the superior court determined that Gant was a recent occupant and concluded that the search of his car was thus justified as incident to his arrest. Gant appealed and the court of appeals again reversed, finding that the search of Gant's car was not incident to his arrest because it was not contemporaneous with his arrest and did not satisfy the rationales set forth in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), for dispensing with the warrant requirement. *State v. Gant*, 213 Ariz. 446, 452, ¶ 18, 143 P.3d 379, 385 (App.2006).

¶ 7 The State petitioned for review, which we granted because this case presents an *642 important question regarding vehicle searches incident to arrest. We have jurisdiction pursuant to Article 6, Section 5(3), of the Arizona Constitution, Arizona Revised Statutes ("A.R.S.") section 13-4032(3) (2001), and Arizona Rule of Criminal Procedure 31.19.

II. DISCUSSION

¶ 8 The Fourth Amendment guarantees the right of citizens to be free from unreasonable governmental searches. U.S. Const. amend. IV; *see also Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).[FN1] "[S]ubject only to a few specifically established and well-delineated exceptions," a search is presumed to be unreasonable under the Fourth Amendment if it is not supported by probable cause and conducted pursuant to a valid search warrant. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

FN1. Gant does not claim a violation of the Arizona Constitution. We therefore consider only whether the search

violated the Fourth Amendment.

¶ 9 The Supreme Court has recognized a "search incident to a lawful arrest" as one of the exceptions to the Fourth Amendment's warrant require-ment. *See, e.g., Chimel*, 395 U.S. at 755, 89 S.Ct. 2034. The Court justified the search incident to arrest exception by the need to protect officers and preserve evidence:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.

Id. at 762-63, 89 S.Ct. 2034. Based on the rationales of officer safety and preservation of evidence, the Court limited the permissible scope of a search incident to arrest to the "arrestee's person and the area 'within his immediate control'"—that is, "the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763, 89 S.Ct. 2034.

¶ 10 Although the rule has worked reasonably well in some contexts, it has proved difficult to apply to automobile searches incident to arrest, prompting the Supreme Court to reconsider and redefine the permissible scope of such a search. *See New York v. Belton*, 453 U.S. 454, 455, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). In *Belton*, a police officer stopped a speeding vehicle and made contact with the

driver and three passengers while all occupants were seated in the vehicle. *Id.* at 455-56, 101 S.Ct. 2860. Upon smelling marijuana, the officer ordered the occupants out of the car, arrested them, and searched each one. *Id.* at 456, 101 S.Ct. 2860. As the driver and passengers stood by, the officer searched the car's passenger compartment and found a jacket containing cocaine. *Id.*

¶ 11 The sole question before the Court in *Belton* was the "constitutionally permissible scope" of an otherwise lawful search of an automobile incident to arrest, given the exigencies of the arrest situation. *Id.* at 455, 457, 101 S.Ct. 2860; *see also Thornton v. United States*, 541 U.S. 615, 619, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (describing *Belton* as deciding "the constitutionally permissible scope of a search" incident to arrest). Noting the lack of consistency among courts in deciding how much of the automobile the police could search incident to arrest and the desirability of a bright-line rule to guide police officers in the conduct of their duties, the Supreme Court held that the area within an arrestee's immediate control encompassed not only "the passenger compartment of an automobile" that the arrestee recently occupied, but also containers within the passenger *643 compartment. *Belton*, 453 U.S. at 458-60, 101 S.Ct. 2860.

¶ 12 The State and our dissenting colleagues seek to bring Gant's case within the *Belton* rule. Unlike *Belton*, however, this case deals not with the permissible scope of the search of an automobile, but with the threshold question whether the police may conduct a search incident to arrest at all once the scene is secure. Because *Belton* does not purport to address this question, we must determine whether officer safety or the preservation of evidence, the rationales that excuse the warrant requirement for searches incident to arrest, justified the warrantless search of Gant's car. *Cf. Dean*, 206 Ariz. at 166, ¶¶ 32-

34, 76 P.3d at 437 (relying on *Chimel* rationales in holding that arrestee was not a recent occupant of vehicle).

¶ 13 Neither rationale supports the search here. At the time of the search, Gant was handcuffed, seated in the back of a locked patrol car, and under the supervision of a police officer. The other two arrestees at the scene were also handcuffed and detained in the back of patrol cars, and the record reflects no unsecured civilians in the vicinity. At least four officers were on the scene. At that point, the police had no reason to believe that anyone at the scene could have gained access to Gant's vehicle or that the officers' safety was at risk. Indeed, one of the officers who searched Gant's car acknowledged at the evidentiary hearing that the scene was secure at the time of the search. Therefore neither a concern for officer safety nor the preservation of evidence justified the warrantless search of Gant's car. Absent either of these *Chimel* rationales, the search cannot be upheld as a lawful search incident to arrest.[FN2]

FN2. We agree with Justice Scalia's statement that applying the *Belton* doctrine to justify a search of the car of a person handcuffed and confined in a police car "stretches [the doctrine] beyond its breaking point." *Thornton*, 541 U.S. at 625, 124 S.Ct. 2127 (Scalia, J., concurring in the judgment).

¶ 14 Nor does this case require this Court to "reconsider *Belton*." *See* Dissent ¶ 27. *Belton* dealt with a markedly different set of circumstances from those present in this case. The four unsecured occupants of the vehicle in *Belton* presented an immediate risk of loss of evidence and an obvious threat to the lone officer's safety that are not present in Gant's case. *See Belton*, 453 U.S. at 455-56, 101 S.Ct. 2860. Thus, in *Belton*, *Chimel's* justifications were satisfied and the search was " 'strictly tied to and justified by' the

circumstances which rendered its initiation permissible." *Id.* at 457, 101 S.Ct. 2860 (quoting *Terry*, 392 U.S. at 19, 88 S.Ct. 1868). Here, to the contrary, because Gant and the other two arrestees were all secured at the time of the search and at least four officers were present, no exigencies existed to justify the vehicle search at its inception. *Belton* therefore does not support a warrantless search on the facts of this case.

¶ 15 It is possible to read *Belton*, as the State and the Dissent do, as holding that because the interior of a car is generally within the reach of a recent occupant, the *Belton* bright-line rule eliminates the requirement that the police assess the exigencies of the situation. But, if no exigency must justify the warrantless search, it would seem to follow that a warrantless search incident to an arrest could be conducted hours after the arrest and at a time when the arrestee had already been transported to the police station. Yet the Court was careful in *Belton* to distinguish *United States v. Chadwick*, 433 U.S. 1, 15, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), in which it had rejected an argument that a search of a footlocker more than an hour after the defendants' arrests could be justified as incidental to the arrest. In doing so, the Court noted that the search occurred "after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency." *Belton*, 453 U.S. at 462, 101 S.Ct. 2860 (quoting *Chadwick*, 433 U.S. at 15, 97 S.Ct. 2476). Such a distinction would be wholly unnecessary under the State's interpretation of *Belton*.

*644 ¶ 16 Relying on language in *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467 (1973), the State

next maintains that the *Chimel* justifications are presumed to exist in all arrest situations simply by "the fact of the lawful arrest," *id.* at 235, 89 S.Ct. 2034 and so it need not show that either *Chimel* rationale existed at the time of the search.

[3][4] ¶ 17 But *Robinson* does not hold that *every* search following an arrest is excepted from the Fourth Amendment's warrant requirement; if it did, the Court's opinions in the cases following *Chimel* would hardly have been necessary. Rather, *Robinson* teaches that the police may search incident to an arrest without proving in any particular case that they were concerned about their safety or the destruction of evidence; these concerns are assumed to be present in every arrest situation. Once those concerns are no longer present, however, the "justifications [underlying the exception] are absent" and a warrant is required to search. *Preston v. United States*, 376 U.S. 364, 367-68, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964); *accord Chambers v. Maroney*, 399 U.S. 42, 47, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) ("[T]he reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house."); *see also Chadwick*, 433 U.S. at 15, 97 S.Ct. 2476. Similarly, when, as here, the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer, the warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence.

¶ 18 The State also argues that the Supreme Court's recent decision in *Thornton*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905, compels a contrary result. In *Thornton*, an officer in an unmarked patrol car ran a check on the license plate of a suspicious

car and discovered that the plate was not registered to that car. *Id.* at 617-18, 124 S.Ct. 2127. Before the officer could pull the car over, Thornton parked and alighted from the car. *Id.* at 618, 124 S.Ct. 2127. The officer parked his patrol car behind Thornton's car, exited, and approached him. *Id.* Thornton agreed to a pat down search, during which the officer felt a bulge in Thornton's pocket. *Id.* Thornton admitted possessing drugs and produced bags containing marijuana and crack cocaine. *Id.* The officer arrested and handcuffed Thornton and placed him in the back of the patrol car. *Id.* The officer then searched Thornton's car and found a gun. *Id.*

¶ 19 Although the facts in *Thornton* resemble those in the case before us, the case is distinguishable. Thornton never claimed that being placed in the patrol car removed the *Chimel* justifications for the search; rather, he challenged the lawfulness of the search of his car on the ground that he was out of his car before his encounter with the police began. *Id.* at 619, 124 S.Ct. 2127. Thus the Supreme Court's opinion addressed only whether the *Belton* rule applies when an officer does not initiate contact with a vehicle's occupant until after the occupant has left the vehicle. *Id.* at 617, 622 n. 2, 124 S.Ct. 2127 (declining to address question on which Court did not grant review), 624 n.4 (plurality declining to address questions other than "whether the [*Belton* rule] is confined to situations in which the police initiate contact with the occupant of a vehicle while that person is in the vehicle"). The answer to that question turned on whether, having stepped out of his car, Thornton was a recent occupant for purposes of *Belton* when he was arrested. *See id.* at 622-24, 124 S.Ct. 2127. The Supreme Court concluded that he was:

> [W]hile an arrestee's status as a "recent occupant" may turn on his temporal or spatial rela-tionship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the

moment that the officer first initiated contact with him.

Id. at 622, 124 S.Ct. 2127 (footnote omitted).[FN3]

FN3. Gant concedes that he was a recent occupant of his car at the time he was arrested, a concession borne out by the facts: Gant was arrested immediately after alighting from his car and within eight to twelve feet of it. *See Thornton*, 541 U.S. at 622, 124 S.Ct. 2127; *Dean*, 206 Ariz. at 166, ¶ 30, 76 P.3d at 437.

¶ 20 Because *Thornton's* holding was carefully limited to the question presented, the *645 Supreme Court did not address whether, even if an arrestee is a recent occupant, a search of the arrestee's vehicle is nonetheless unlawful if concerns for officer safety or destruction of evidence —the *Chimel* justifications—no longer exist at the time of the search. *See id.* at 622 n. 2, 624 n. 4, 124 S.Ct. 2127

¶ 21 We are aware that most other courts presented with similar factual situations have found *Belton* and *Thornton* dispositive of the question whether a search like the one at issue was incident to arrest. *E.g., United States v. Mapp*, 476 F.3d 1012, 1014-15, 1019 (D.C.Cir.) (upholding search of arrestee's car conducted after he had been handcuffed and placed in patrol car), *cert. denied*, 127 S.Ct. 3031 (Jun. 25, 2007); *United States v. Hrasky*, 453 F.3d 1099, 1100, 1103 (8th Cir.2006) (same), *cert. denied*, — U.S. —, 127 S.Ct. 2098, 167 L.Ed.2d 812 (2007); *United States v. Osife*, 398 F.3d 1143, 1144, 1146 (9th Cir.2005) (same); *accord State v. Waller*, 918 So.2d 363, 364, 366-68 (Fla.Dist.Ct.App.2005) (uphold-ing search of arrestee's truck conducted after he was handcuffed and "secured at the back of the truck"); *Rainey v. Commonwealth*, 197 S.W.3d 89, 91, 95 (Ky.2006) (upholding search of arrestee's car conducted after he was handcuffed and "so far from his vehicle that it was unlikely he could have accessed it"), *cert. denied*, —

U.S. ----, 127 S.Ct. 1005, 166 L.Ed.2d 713 (2007); *State v. Scott*, 200 S.W.3d 41, 43-44 (Mo.Ct.App.2006) (upholding search of arrestee's car conducted after he had been handcuffed and placed in patrol car); *see also Thornton*, 541 U.S. at 628, 124 S.Ct. 2127 (Scalia, J., concurring in the judgment, citing cases upholding searches conducted after arrestee had been handcuffed and secured in patrol car). We do not, however, read *Belton* or *Thornton* as abandoning the *Chimel* justifications for the search incident to arrest exception. *See Thornton*, 541 U.S. at 621, 124 S.Ct. 2127 ("In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle."); *Belton*, 453 U.S. at 460 n. 3, 101 S.Ct. 2860 ("Our holding today does no more than determine the meaning of *Chimel's* principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests."). Because neither *Belton* nor *Thornton* addresses the precise question presented here, we must, if we are to maintain our constitutional moorings, rely on *Chimel's* rationales in reaching our holding.[FN4]

FN4. Other courts have followed this approach as well. *See Ferrell v. State*, 649 So.2d 831, 833 (Miss.1995) (holding that search of arrestee's car conducted after he had been handcuffed and placed in patrol car did not fall within search incident to arrest exception because the rationales underlying the exception were absent); *State v. Greenwald*, 109 Nev. 808, 858 P.2d 36, 37 (1993) (same, citing *Chimel*).

¶ 22 Amici Arizona Law Enforcement Legal Advisors' Association and Arizona Association of Chiefs of Police assert that, as a result of our holding, police officers will

not secure arrestees until after they have searched the passenger compartment of an arrestee's vehicle, thus jeopardizing the officers' safety. We presume that police officers will exercise proper judgment in their contacts with arrestees and will not engage in conduct that creates unnecessary risks to their safety or public safety in order to circumvent the Fourth Amendment's warrant require-ment. In this technological age, when warrants can be obtained within minutes, it is not unreasonable to require that police officers obtain search warrants when they have probable cause to do so to protect a citizen's right to be free from unreasonable governmental searches.

¶ 23 We recognize the importance of providing consistent and workable rules to guide police officers in making decisions in the field. *Belton* sought to address this concern by creating a bright-line rule regarding the scope of automobile searches incident to arrest. The Supreme Court has not, however, adopted a bright-line rule for determining whether a warrantless search of an automobile*646 is justified to begin with. In the absence of such a rule, we look to the circumstances attending the search to determine whether a warrant was required. *See Dean*, 206 Ariz. at 166, ¶ 34, 76 P.3d at 437 (examining "the totality of the facts" in determining the necessity for a warrant).[FN5] When, based on the totality of the circumstances, an arrestee is secured and thus presents no reasonable risk to officer safety or the preservation of evidence, a search warrant must be obtained unless some other exception to the warrant requirement applies.

FN5. The Dissent suggests that the majority opinion departs from a "'straightforward rule' that does not depend on case-by-case adjudication." Dissent ¶ 39. But our dissenting colleagues concede that a *Belton* search is proper only if it is "a contemporaneous

incident" of the arrest. *Id.* ¶ 38. Determining whether the search is a contemporaneous incident, however, requires the very case-by-case examination of the facts that the Dissent criticizes. *See Preston*, 376 U.S. at 367, 84 S.Ct. 881. Indeed, *Thornton* teaches that a determination that the defendant was a recent occupant of the searched vehicle must also occur before the *Belton* rule regarding the permissible scope of a search applies. 541 U.S. at 622, 124 S.Ct. 2127. Thus, this opinion does not eviscerate any existing bright-line rule; it merely inquires whether an exigency remains to justify the search when the defendant is locked in a police car, just as the Dissent would ask whether the search was reasonably contemporaneous to the arrest, and as the Court in *Thornton* inquired to determine whether the defendant was so recent an occupant as to present the threat of destruction of evidence or access to a weapon. If the exigency justifying a search incident to arrest disappears when the search is not proximate in time to the arrest (or when the arrestee is not a recent occupant of the car), it follows that the justifying exigency would also disappear once the arrestee no longer has any possible access to evidence or weapons.

¶ 24 The State has advanced no alternative theories justifying the warrantless search of Gant's car, and we note that no other exception to the warrant requirement appears to apply. The officers did not have probable cause to search Gant's car for contraband, as is required by the automobile exception. *See Chambers*, 399 U.S. at 51-52, 90 S.Ct. 1975. No evidence or contraband was in plain view. *See Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality opinion). Moreover, the officers testified that they had no intention of impounding Gant's car until

after they searched the passenger compartment and found the contraband. Thus the search cannot be characterized as an inventory search. *See South Dakota v. Opperman*, 428 U.S. 364, 372, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). There being no other exception to the warrant requirement justifying the search of Gant's car, the warrantless search was unlawful.

III. CONCLUSION

¶ 25 For the foregoing reasons, we hold that the warrantless search of Gant's car was not justified by the search incident to arrest exception to the Fourth Amendment's warrant require-ment. The evidence obtained as a result of the unlawful search must therefore be suppressed. We reverse the judgment of the superior court and affirm the judgment of the court of appeals suppressing the evidence, but vacate the opinion of the court of appeals.

CONCURRING: MICHAEL D. RYAN and ANDREW D. HURWITZ, JJ.

BALES, Justice, dissenting.

¶ 26 Police officers immediately confronted Gant when he drove up and got out of his car; within minutes, they arrested him, placed him in handcuffs, and locked him in a patrol car; they then promptly searched his car, where they found a pistol and a bag of cocaine. The majority holds that the warrantless search cannot be justified as incident to Gant's arrest because, at the time of the search, there were no exigent concerns for either officer safety or the preservation of evidence. *See* Op. ¶¶ 13, 20.

¶ 27 Because I believe that the majority's reasoning and conclusion are inconsistent with the Supreme Court's decision in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), I respectfully dissent. Although there may be good reasons to reconsider *Belton*, doing so is the sole prerogative of the Supreme

Court, even if later developments have called into question the rationale for its decision. *See State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997).

*647 ¶ 28 *Belton* itself was an extension of the Court's holdings in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). In *Chimel*, the Court held that, incident to a lawful arrest, police may properly search the arrestee and the area within the arrestee's "immediate control" without a warrant. 395 U.S. at 763, 89 S.Ct. 2034. Although "*Chimel* searches" are justified by general concerns for officer safety and the preservation of evidence, *see id.*, in *Robinson* the Court held that such searches are permissible regardless of whether, in the circumstances of a particular case, "there was present one of the reasons supporting the" exception to the warrant requirement, 414 U.S. at 235, 94 S.Ct. 467.

¶ 29 The Court in *Belton* considered the application of *Chimel* and *Robinson* when police arrest an occupant or recent occupant of an automobile. There, an officer stopped a car and, having reason to believe the occupants unlawfully possessed marijuana, ordered the driver and his three companions out of the car and placed them under arrest. 453 U.S. at 455-56, 101 S.Ct. 2860. After searching each individual, the officer then searched the car's passenger compartment, where he discovered a jacket on the back seat. *Id.* at 456, 101 S.Ct. 2860. He opened one of the jacket pockets and found cocaine. *Id.*

¶ 30 *Belton* upheld the officer's search of the jacket as a valid search incident to arrest even though it occurred after the defendant had been removed from the car and could not reach the jacket. *Id.* at 462-63, 101 S.Ct. 2860. The Court first extended the *Chimel* exception to the passenger

area of a car by adopting the "generalization" that an arrestee might reach within this area to grab a weapon or destroy evidence. *Id.* at 460, 101 S.Ct. 2860. Having defined the area of the suspect's "immediate control" to include the passenger compartment, the Court went on to hold that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment" and "the contents of any containers found within." *Id.* (footnote omitted).

¶ 31 The search authorized by *Belton* does not depend on a case-specific determination that there may be weapons or evidence in the automobile. Indeed, the Court noted that its holding would allow searches of containers that "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." *Id.* at 461, 101 S.Ct. 2860. The Court nonetheless concluded that the lawful arrest itself justified the search. Quoting *Robinson*, the Court noted that "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would ... be found." *Id.*

¶ 32 In holding that the search of Gant's automobile violated the Fourth Amendment, the majority's analysis conflicts with *Belton* in three respects. The majority concludes that the search was not incident to Gant's arrest because the *Chimel* concerns for officer safety and preservation of evidence were not present. *See* Op. ¶ 13 ("Absent either of these *Chimel* rationales, the search cannot be upheld as a lawful search incident to arrest.").

¶ 33 The validity of a *Belton* search, however, clearly does not depend on the presence of the *Chimel* rationales in a particular case. Indeed, in *Belton*, the New York Court

of Appeals, much like the majority here, held that the search could "not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article." 453 U.S. at 456, 101 S.Ct. 2860 (quoting *People v. Belton*, 50 N.Y.2d 447, 429 N.Y.S.2d 574, 407 N.E.2d 420, 421 (1980)). In reversing the state court and upholding the search, the Court in *Belton* did not question the state court's finding that the jacket was inaccessible. Justice Brennan, dissenting in *Belton*, pointedly noted that "the Court today substantially expands the permissible scope of searches incident to arrest by permitting police officers to search areas and containers the arrestee could not *648 possibly reach at the time of arrest." *Id.* at 466, 101 S.Ct. 2860.

¶ 34 Justice Brennan explicitly made the argument that the majority adopts here. "When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel's* limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband." *Id.* at 465-66, 101 S.Ct. 2860. While these observations have force, if they did not persuade a majority of the Supreme Court in *Belton*, I do not think it is appropriate for our Court to effectively rewrite *Belton* as embracing them now.

¶ 35 *Belton* is also inconsistent with the majority's focus on the *Chimel* rationales at the time of the *search*. *See* Op. ¶¶ 13-14. In *Belton* itself the search did not take place until after the officer had already removed the defendant from the car. 453 U.S. at 456, 101 S.Ct. 2860. The Court did not consider whether one of the *Chimel* rationales was present at the time of the search; instead, the Court noted that the search was justified by the arrest itself. *Id.* at 461, 101 S.Ct. 2860. That the jacket was within

the passenger compartment in which Belton "had been a passenger just before he was *arrested*," meant that it was within his "immediate control" for purposes of the search incident to arrest. *Id.* at 462, 101 S.Ct. 2860 (emphasis added).

¶ 36 Because a *Belton* search is justified by circumstances that the Supreme Court thought generally exist upon the arrest of the occupant of a vehicle, the validity of the search does not depend on particularized concerns for officer safety or preservation of evidence at the time of the search. Thus, *Belton* rejected the argument that the search of the jacket in that case was improper because it did not occur until after the officer had reduced it to his "exclusive control." *Id.* at 461 n.5, 101 S.Ct. 2860. Recognizing the implications of the Court's reasoning, Justice Brennan noted, "Under the approach taken today, the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car before placing them under arrest...." *Id.* at 468, 101 S.Ct. 2860.

¶ 37 The point noted by Justice Brennan in his dissent has been recognized by nearly every appellate court that has since considered the issue: *Belton* implies that warrantless searches may be conducted even when the arrestee has been handcuffed and locked in a patrol car. *See, e.g., United States v. Hrasky*, 453 F.3d 1099, 1101 (8th Cir.2006) (stating that the incapacitation of the arrestee does not invalidate a subsequent search incident to arrest under *Belton), cert. denied*, — U.S. —, 127 S.Ct. 2098, 167 L.Ed.2d 812 (2007); *United States v. Weaver*, 433 F.3d 1104, 1107 (9th Cir.) (concluding that *Belton* controls where the arrestee is handcuffed and locked in a patrol car), *cert. denied*, — U.S. —, 126 S.Ct. 2053, 164 L.Ed.2d 804 (2006); *United States v. Wesley*, 293 F.3d 541, 547-49 (D.C.Cir.2002) (same); *United States v. Humphrey*, 208 F.3d 1190, 1202 (10th Cir.2000) (same); 3 Wayne R. LaFave, *Search and Seizure: A Treatise on*

the Fourth Amendment § 7.1(c), at 517 & n. 89 (4th ed.2004) (listing cases).

¶ 38 That the *Chimel* rationales need not be present in a particular case does not, as the majority contends, mean that police may conduct warrantless searches hours after an arrest. *See* Op. ¶ 15. *Belton* upheld the warrantless search of a vehicle's passenger compartment "as a *contemporaneous incident* " of the occupant's arrest. 453 U.S. at 460, 101 S.Ct. 2860 (emphasis added). In so ruling, the Court distinguished *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), as not involving a search incident to an arrest, *see* 453 U.S. at 461-62, 101 S.Ct. 2860. The post-arrest search in *Belton* was justified because it was incidental to the arrest, not because other exigencies were present that were absent in *Chadwick*. Thus, although *Belton* does not require a warrantless search to occur simultaneously with the arrest, it must occur within some temporal proximity. *See Hrasky*, 453 F.3d at 1101 (discussing decisions requiring search to occur "roughly contemporaneous with the arrest" or within a "reasonable time" after police obtain control of the vehicle); *649*United States v. Butler*, 904 F.2d 1482, 1484 (10th Cir.1990) (concluding that search of item found in vehicle at police station not contemporaneous with arrest); *State v. Smith*, 120 Idaho 77, 813 P.2d 888, 891 (1991) (stating that half hour delay between arrest and search permissible); *State v. Kunkel*, 455 N.W.2d 208, 210 (N.D.1990) (concluding that search at police station not contemporaneous with earlier arrest).

¶ 39 The majority also departs from *Belton's* determination that searches in this context should be guided by a "straightforward rule" that does not depend on case-by-case adjudication. *See* 453 U.S. at 458-59, 101 S.Ct. 2860. The majority concludes that a *Belton* search is not justified unless, "based on the totality of the

circumstances," there is a "reasonable risk to officer safety or the preservation of evidence." Op. ¶ 23. Such an inquiry can only be made on a case-specific basis, initially by officers in the field and, if a search is later challenged, post hoc by reviewing courts. This approach is at odds with the core premise of *Belton*. *See Thornton v. United States*, 541 U.S. 615, 622-23, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) ("The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated.").[FN6]

FN6. *Belton* itself does not completely avoid the need for case-by-case inquiry, inasmuch as the Court limited the exception to searches that are the contemporaneous incident of the arrest of a vehicle's occupant or recent occupant. Justice Brennan made this very point in his dissent. *See* 453 U.S. at 469-71, 101 S.Ct. 2860. But this does not imply, as the majority contends, ¶ 23 n. 5, that *Belton's* application should turn on a case-specific finding of exigent circumstances at the time of the search. Nor does *Thornton* suggest that a case-specific assessment of exigent circumstances should determine whether an arrestee is a "recent occupant" for purposes of the *Belton* exception. *See* 541 U.S. at 623, 124 S.Ct. 2127 (refusing to limit *Belton* to searches in which police initiate contact with suspect as it would involve "inherently subjective" and "highly fact specific" determinations that *Belton* sought to avoid).

¶ 40 The bright-line rule embraced in *Belton* has long been criticized and probably merits reconsideration. *Belton* created a significant exception to the Fourth Amendment's warrant requirement by making a generalization about the exigencies of arrests

involving automobiles and then allowing searches whether or not the concerns justifying the exception were present in any particular case. *Belton* thus rests on a "shaky foundation," *id.* at 624, 124 S.Ct. 2127 (O'Connor, J., concurring in part), that has become even more tenuous over time. Police officers routinely secure suspects by handcuffing them before conducting *Belton* searches. *Id.* at 628, 124 S.Ct. 2127 (Scalia, J., joined by Ginsburg, J., concurring in the judgment) (noting that "[i]f it was ever true that" arrestees generally have access to passenger compartments, "it certainly is not true today"). *See generally* David S. Rudstein, Belton *Redux: Reevaluating* Belton's *Per Se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 Wake Forest L.Rev. 1287, 1333-34 (2005) (discussing police practices).

¶ 41 But even if *Belton* were to be reconsidered, the approach adopted by the majority is only one of several possible alternatives. *See id.* at 1338-59. Although the majority revives a case-by-case approach focusing on the presence of the *Chimel* rationales at the time of the search, it would also be possible to imagine a bright-line limitation to *Belton's* bright-line exception. For example, one could argue that a *Belton* search is never justified as "incident to arrest" if it occurs after a suspect is handcuffed outside the vehicle. Or perhaps *Belton* should be limited so it continues to allow searches of the passenger compartment but not containers found therein, *see Thornton*, 541 U.S. at 634, 124 S.Ct. 2127 (Stevens, J., joined by Souter, J., dissenting), or even replaced by a rule "built on firmer ground," *id.* at 625, 124 S.Ct. 2127 (O'Connor, J., concurring in part), that would allow warrantless searches when "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle," *id.* at 632, 124 S.Ct. 2127 (Scalia, J., joined by Ginsburg, J., concurring in the judgment).

¶ 42 If Gant had developed an argument under Article 2, Section 8, of the Arizona Constitution, we might properly have considered*650 whether, as a matter of state law, to reject or modify the *Belton* rule. Several other state courts have done so. *See, e.g., State v. Eckel*, 185 N.J. 523, 888 A.2d 1266, 1275-77 (2006) (rejecting *Belton* rule under state constitution); *State v. Bauder*, 924 A.2d 38, 46 ¶ 19 (Vt.2007) (describing state court decisions rejecting *Belton* rule under state constitutions). Here, however, we are faced only with arguments based on the Fourth Amendment.

¶ 43 We can add our voice to the others that have urged the Supreme Court to revisit *Belton*. *See, e.g., Weaver*, 433 F.3d at 1107 (noting that *Belton* "is broader than its stated rationale" and suggesting that the Supreme Court re-examine this issue). We cannot, however, take it upon ourselves to re-examine *Belton's* interpretation of the Fourth Amendment. Because *Belton* allows the search of Gant's vehicle, I respectfully dissent.

CONCURRING: RUTH V. McGREGOR, Chief Justice.

APPENDIX B

213 Ariz. 446
143 P.3d 379

Court of Appeals of Arizona, Division 2, Department B.
The STATE of Arizona, Appellee,
v.
Rodney Joseph GANT, Appellant.
No. 2 CA-CR 2000-0430.

Sept. 20, 2006.
Review Granted Feb. 8, 2007.

Background: Defendant was convicted in the Superior Court, Pima County, No. CR-20000042, Clark W. Munger, J., of unlawful possession of cocaine for sale and unlawful possession of drug paraphernalia. Defendant appealed. The Court of Appeals, 202 Ariz. 240, 43 P.3d 188, reversed. The United States Supreme Court granted state's petition for certiorari, and subsequently vacated and remanded. The Court of Appeals remanded for evidentiary hearing on legality of warrantless search. On remand, the Superior Court, Pima County, No. CR-20000042, Barbara Sattler, Judge Pro Tempore, found no violation. Defendant appealed.

Holding: The Court of Appeals, Brammer, J., held that officers' warrantless search of defendant's vehicle, incident to his arrest, violated the Fourth Amendment.

Reversed.

Espinosa, J., filed dissenting opinion.

[Headnotes omitted]

**380Terry Goddard, Arizona Attorney General, By Randall M. Howe and Eric J. Olsson, Tucson, Attorneys for Appellee.
Law Offices of Thomas Jacobs, By Thomas Jacobs, Tucson, Attorney for Appellant.

BRAMMER, Judge.

¶ 1 After the United States Supreme Court vacated our decision in *State v. Gant*, 202 Ariz. 240, 43 P.3d 188 (App.2002),[FN1] we remanded this matter to the superior court, directing it to hold an evidentiary hearing and make factual findings on whether the officers' warrantless search of Gant's vehicle, incident to his arrest, violated the Fourth Amendment to the United States Constitution.[FN2] *State v. Gant*, No. 2 CA-CR 2000-0430 (memorandum decision filed April 28, 2004). The trial court found no violation. Gant now appeals from that ruling.[FN3] We reverse.

FN1. *Arizona v. Gant*, 540 U.S. 963, 124 S.Ct 461, 157 L.Ed.2d 308 (2003).

FN2. Gant also challenges the trial court's ruling on the ground that the search violated the Arizona Constitution. But we decline to address that argument because Gant neither presented it to the trial court nor articulated on appeal how or why our interpretation of the relevant state constitutional provision should depart from our Fourth Amendment analysis. *See State v. Petzoldt*, 172 Ariz. 272, 276, 836 P.2d 982, 986 (App.1991) (state constitutional claim is abandoned when unsupported by specific argument).

FN3. We requested supplemental briefing on our jurisdiction to review the trial court's denial of Gant's motion to suppress the evidence. The state responded, citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n. 2, 103

S.Ct. 2573, 2575, 77 L.Ed.2d 22 n.2 (1983), that the Supreme Court's "reversal of [our] decision would reinstate the judgment of conviction and the sentence entered by the [trial court]," thereby vesting our jurisdiction over the appeal pursuant to A.R.S. § 13-4031. Gant filed nothing suggesting an absence of jurisdiction.

Standard of Review and Background

¶ 2 Gant argues the trial court erred in denying his motion to suppress evidence seized from his vehicle. We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion, considering the evidence in the light most favorable to upholding the court's decision. *State v. Paredes*, 167 Ariz. 609, 612, 810 P.2d 607, 610 (App.1991). We look only to the evidence presented at the hearing on the motion. *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996). We defer to the trial court's findings of fact if reasonable evidence supports them but review the court's legal determination de novo. *State v. Wyman*, 197 Ariz. 10, ¶ 5, 3 P.3d 392, 395 (App.2000).

¶ 3 Law enforcement officers arrested Gant on an outstanding warrant after he stepped out of an automobile they had seen him driving. After placing Gant in handcuffs and locking him in the back of a patrol car, and without obtaining a search warrant, the officers searched his vehicle and found cocaine in the pocket of a jacket they found in the vehicle. As we stated in our previous memorandum decision:

Before trial, Gant moved to suppress the cocaine, arguing that the officers had searched his vehicle illegally because no exception to the Fourth

Amendment's warrant requirement applied. The trial court denied the motion, and Gant was convicted following trial of unlawful possession of cocaine for sale and unlawful possession of drug paraphernalia. He was sentenced to concurrent, mitigated prison terms, the longest of which was three years.

In our initial review of Gant's appeal, we concluded that the trial court had improperly denied his motion to suppress the evidence [because the police officer had initiated contact with Gant after Gant had left the vehicle]. The state petitioned our supreme court for review. The court denied the petition, and our mandate issued on October 23, 2002. The state then petitioned the United States Supreme Court for certiorari....

****381*448** The United States Supreme Court granted the state's petition for certiorari on April 21, 2003, *Arizona v. Gant*, 538 U.S. 976, 123 S.Ct 1784, 155 L.Ed.2d 664 (2003), and set the case for oral argument the following November. While the case was awaiting argument, the Arizona Supreme Court decided [*State v.*] *Dean*, [206 Ariz. 158, 76 P.3d 429 (2003),] which criticized our decision in *Gant* and rejected its analysis. The United States Supreme Court subsequently vacated both the scheduled argument and our resolution of Gant's appeal and remanded the case to us for reconsideration in light of *Dean*. *Arizona v. Gant*, [540] U.S. [963], 124 S.Ct 461, 157 L.Ed.2d 308 (2003).

State v. Gant, No. 2 CA-CR 2000-0430, ¶¶ 3-5 (memorandum decision filed April 28, 2004). After our opinion had been vacated, and because the facts regarding the search had only been "stipulated to by the parties ... without the benefit of testimony by witnesses," we remanded the case to the trial court for an evidentiary hearing on the legality of the

warrantless search. *Id.* ¶¶ 1, 2.

¶ 4 At the evidentiary hearing, Tucson police officers testified that they had first contacted Gant at a residence after responding to a tip about narcotics activity there. Gant told them that the owner of the residence was not present, so the officers departed after obtaining Gant's name. The officers then conducted a routine record check and found Gant had a suspended driver's license and an outstanding warrant for driving with a suspended license. The officers returned later in the evening, arrested one person at the residence for possession of drug paraphernalia and another for giving false information, and then saw Gant drive up to the residence. As Gant stepped out of the vehicle, an officer called to him and Gant walked toward the officer. The officer placed Gant under arrest about eight to ten feet from Gant's car. Gant was handcuffed and locked into the back of a nearby patrol car.

¶ 5 Within one to three minutes of the arrest, two officers searched Gant's car. Therein, the police found contraband and a weapon. At the time of the search, the other arrestees had also been secured: both had been placed into handcuffs and locked into the back of patrol cars. The residence's owner was not present at this time and, although officers "were anticipating [her] arrival," nothing in the record suggests she returned to the home that night.

¶ 6 Based on the officers' uncontradicted testimony, the trial court found that Gant's vehicle had been "searched almost immediately after he was placed in a patrol car" and that Gant "was apparently at most 8-10 feet from the car" when he was arrested. The court therefore denied the motion to suppress after concluding that, under the "recent occupancy" test

of *State v. Dean*, 206 Ariz. 158, ¶ 30, 76 P.3d 429, 437 (2003), the "search was conducted immediately after arrest," and Gant was arrested in "close proximity" to his vehicle. This appeal followed.

Discussion

¶ 7 The Fourth Amendment proscribes all "unreasonable searches and seizures," which, under most conditions, requires the state to obtain a warrant before conducting a search. U.S. Const. amend. IV; *see Dean*, 206 Ariz. 158, ¶ 8, 76 P.3d at 432. A trial court presumes warrantless searches are unreasonable, and the state bears the burden of establishing that evidence has been lawfully seized. *See State v. Ault*, 150 Ariz. 459, 464, 724 P.2d 545, 550 (1986). A warrantless search is presumptively unreasonable and, therefore, unconstitutional unless it "falls within one of the few specifically established and well-delineated exceptions to the constitutional warrant requirement." *State v. Kempton*, 166 Ariz. 392, 395-96, 803 P.2d 113, 116-17 (App.1990). One exception courts have recognized allows officers to conduct a warrantless search of an arrestee's person and, contemporaneous to the arrest, the area within the arrestees immediate control. *Chimel v. California*, 395 U.S. 752, 762-63, 89 S.Ct 2034, 2040, 23 L.Ed.2d 685 (1969); *Dean*, 206 Ariz. 158, ¶¶ 11-12, 76 P.3d at 432-33.

¶ 8 In *Chimel*, the Supreme Court explained the rationale justifying the exception:

****382*449** When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely

reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.

395 U.S. at 762-63, 89 S.Ct at 2040. Thus, the exception to the warrant requirement for such searches is premised on the "twin aims" of officer safety and preservation of evidence. *Dean,* 206 Ariz. 158, ¶ 13, 76 P.3d at 433.

¶ 9 Gant argues that, because he and the other suspects were handcuffed and either locked in the police vehicles or otherwise secured, neither rationale for departing from the warrant requirement existed at the time the search was conducted. In essence, Gant contends that, by the time the search occurred, no officer could have reasonably believed that the arrestees presented any risk of reaching a weapon or destroying evidence located in his car. We agree with Gant that our analysis must be guided by the rationales underlying the search incident to arrest exception to the warrant requirement and that these rationales are absent under the circumstances here.

¶ 10 In *Dean,* our supreme court addressed the search of a vehicle incident to a defendant's arrest when the arrest was remote in time and location from the defendant's occupancy of the vehicle. 206 Ariz. 158, ¶¶ 3-4, 76 P.3d at 431. A unanimous court noted that *Chimel,* the seminal United States Supreme Court case authorizing warrantless searches incident to arrest, had emphasized that the scope of such a search " 'must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.' " *Dean,* 206 Ariz. 158, ¶ 12, 76 P.3d at 433, *quoting Chimel,* 395

U.S. at 762, 89 S.Ct. at 2039, *quoting Terry v. Ohio,* 392 U.S. 1, 19, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 (1968). Thus, the Arizona Supreme Court has reminded us that a warrantless search incident to arrest is not only justified, but is also limited, by the need to promote officer safety and prevent destruction of evidence. In that context, the supreme court has instructed us to examine "whether the totality of the facts ... presents the kind of situation that justifies dispensing with the warrant requirement." *Dean,* 206 Ariz. 158, ¶ 34, 76 P.3d at 437. Indeed, the *Dean* court invalidated the search in the case before it precisely because "neither of the justifications for a warrantless search of the vehicle-protection of the arresting officers and preservation of the evidence-[wa]s present." *Id.* ¶ 32, 76 P.3d 429.

¶ 11 We are mindful the United States Supreme Court has stated that "[e]very arrest must be presumed to present a risk of danger to the arresting officer." *Washington v. Chrisman,* 455 U.S. 1, 7, 102 S.Ct 812, 817, 70 L.Ed.2d 778 (1982). But, here, the state has presented no concrete evidence whatsoever that, when the officers searched Gant's car, there was any risk of the arrestees acquiring a weapon in Gant's car or destroying any evidence therein.[FN4] To the contrary, both of the relevant witnesses, Officers Todd Griffith and Robert Reed, testified that Gant, once handcuffed and secured in the back of a patrol car, posed no risk of returning to his car and tampering with any items in it.[FN5] The officers also testified that ***450**383** the two arrestees at the scene were similarly confined in handcuffs and seated in the back of patrol cars.[FN6] Thus, although we presume an arrest both poses risks to officer safety and creates an incentive for arrestees to destroy evidence, those risks had ceased to exist at

the time of the search in this case.

FN4. The officers did testify generally that "officer safety is always an issue" during illegal drug sale investigations because it is not unusual for the people involved to have weapons. Two officers also testified that they had been told that a female who owned the house was not present at the scene and might return to the home. However, as discussed *infra*, both officers conceded, in essence, that there was no reasonable possibility the civilians actually at the scene-Gant and two additional arrestees-could have accessed Gant's vehicle.

FN5. Officer Reed testified that, at the time of the search of Gant's vehicle, Gant "had been secured" and therefore "no longer presented a threat to me or anyone else because he had no access to anything else." Officer Griffith conceded there had been no reasonable possibility Gant could escape from the patrol car and get into his own vehicle. Griffith also testified that Gant had been locked in the back of the patrol vehicle and that the back doors "can't [be] open[ed] from the inside."

FN6. Both officers testified that the additional male arrestee had been confined to a police car and handcuffed when the car was searched. Officer Reed specifically recalled that the female arrestee had likewise been handcuffed and

secured in a patrol car at the time of the search. Officer Griffith corroborated that the female had been arrested and handcuffed by the time of the search, but could not recall whether she had been placed in a patrol car.

¶ 12 The state contends that the United States Supreme Court's holdings in *Thornton v. United States*, 541 U.S. 615, 124 S.Ct 2127, 158 L.Ed.2d 905 (2004), and *New York v. Belton*, 453 U.S. 454, 101 S.Ct 2860, 69 L.Ed.2d 768 (1981), compel a different result. Although the state is correct that the facts of *Thornton* are "not meaningfully distinguishable" from the facts in this case, *Thornton* resolved a different issue: whether an officer may conduct a search incident to arrest "even when an officer does not make contact until the person arrested has left the vehicle." [FN7]541 U.S. at 617, 124 S.Ct at 2129. And, although Justices Scalia and Ginsberg addressed the precise issue raised here in a concurring opinion-whether officers may conduct a search incident to arrest once the arrestee is handcuffed and secured in the back of a patrol car [FN8]- a majority of the Court specifically declined to reach that issue because it had not been briefed by the litigants. *Id.* at 624 n. 4, 124 S.Ct at 2132 n. 4 ("Whatever the merits of Justice Scalia's opinion concurring in the judgment, this is the wrong case in which to address them."); *id.* at 625, 124 S.Ct. at 2133 (O'Connor, J., concurring) (declining to reach the issue "in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit"). Accordingly, we cannot agree with the state's contention that this case is controlled by *Thornton*. To the contrary, the concurring opinions in *Thornton* demonstrate that the issue we address is far from settled.[FN9]

FN7. In this appeal, Gant does not contend the search of his vehicle was invalid for that reason.

FN8. *See* 541 U.S. at 625, 124 S.Ct at 2133 (concluding search not justified under *Chimel* exception when risk that the defendant would "'grab a weapon or evidentiary ite[m]' from his car was remote in the extreme") (Scalia, J., and Ginsberg, J., concurring), *quoting Chimel,* 395 U.S. at 763, 89 S.Ct at 2040 (brackets in *Thornton*).

FN9. At oral argument, the state asserted that we should look at a later part of footnote four in *Thornton,* in which the plurality asserted that Justice Scalia's position in his concurrence would, "for all intents and purposes, [overrule] our established constitutional precedent." 541 U.S. at 624 n. 4, 124 S.Ct. at 2132 n. 4. However, this footnote was only endorsed by four members of the Court.

¶ 13 In *Belton,* the defendant challenged the scope of an otherwise valid search of his car, contending the officers had searched parts of the passenger compartment he could not have possibly reached had he desired to destroy evidence or seize a weapon. 453 U.S. at 455-56, 101 S.Ct at 2861-62. Rejecting his claim, the Court found that "articles inside the ... passenger compartment of an automobile are ... generally ... within 'the area ... an arrestee might reach in order to grab a weapon or evidentiary ite[m]' " and, therefore, "as a

contemporaneous incident" to the lawful arrest, officers were entitled to search the entire passenger compartment of a vehicle. *Id.* at 460, 101 S.Ct. at 2864,*quoting Chimel,* 395 U.S. at 763, 89 S.Ct. at 2040 (brackets in *Belton*). In so holding, the Court emphasized that " '[a] single, familiar standard is essential to guide police officers' " and implied that it had erected a bright-line rule to relieve officers in the field from having to make hairline distinctions based on subtle nuances. *Id.* at 458, 101 S.Ct at 2863, *quoting Dunaway v. New York,* 442 U.S. 200, 213-14, 99 S.Ct 2248, 2256-57, 60 L.Ed.2d 824 (1979).

¶ 14 The state contends we should employ the same approach here by ruling that, once officers arrest a recent occupant of a vehicle, they should be entitled to search that vehicle ***451**384** without having to distinguish whether the rationales justifying the search apply under the specific circumstances of the case. In this vein, the state maintains that whether the two *Chimel* rationales are present is "irrelevant" because "those risks are presumed to exist" once an arrest occurs. It relies on *United States v. Robinson,* 414 U.S. 218, 235, 94 S.Ct 467, 477, 38 L.Ed.2d 427 (1973), which held:

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.... It is the fact of the lawful arrest which establishes the authority to search.... [FN10]

FN10. *Robinson* involved a search of a person rather than the search of a person's area of control. 414 U.S. at 224, 94 S.Ct at 471. The Court

> distinguished search of a person from other searches incident to arrest. *Id.; see generally* 3 Wayne R. LaFave, *Search and Seizure,* §§ 6.3(c), 7.1(b) (4d ed.2004).

See also Michigan v. Long, 463 U.S. 1032, 1050 n. 14, 103 S.Ct 3469, 3481 n. 14, 77 L.Ed.2d 1201 (1983) ("[T]he 'bright line' [the Supreme Court] drew in *Belton* clearly authorizes such a[n] [automobile] search whenever officers effect a custodial arrest.").

¶ 15 We acknowledge the principles set forth in *Belton* and *Robinson,* but we disagree that they apply here. First, our own supreme court has specifically rejected such a broad application of the *Belton-Robinson* bright-line rule. In *Dean,* the court explained that, "although *Belton* provided clear guidance with respect to th[e] *spatial* limitation" on the scope of an otherwise lawful search, *Belton* did not signal a retreat from the limitations on the justification for conducting a search in the first instance. 206 Ariz. 158, ¶¶ 17-18, 76 P.3d at 434. As the court observed, the *Belton* majority clarified that its bright line rule "'in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.'" *Id., quoting Belton,* 453 U.S. at 460 n.3, 101 S.Ct at 2864 n. 3.

¶ 16 Second, far from concluding that the constitutional basis for a search incident to arrest is always presumed from the inherent dangers of an arrest, the *Belton* majority underscored the continuing vitality of its two previous opinions invalidating searches incident to arrest when the appropriate constitutional bases for the exception to the warrant requirement did not exist. 453 U.S. at 461-62, 101 S.Ct at 2864-65 (distinguishing *United*

States v. Chadwick, 433 U.S. 1, 97 S.Ct 2476, 53 L.Ed.2d 538 (1977), and *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct 2586, 61 L.Ed.2d 235 (1979), and observing that, unlike the circumstances in *Belton*, "neither of those cases involved an arguably valid search.").

¶ 17 In short, neither the Arizona Supreme Court nor the United States Supreme Court has characterized *Belton* as relieving the state of its duty to demonstrate the appropriate constitutional basis for a search conducted incident to an arrest. Rather, both courts have restricted the *Belton* reasoning to questions regarding the spatial scope of an already valid search.[FN11] *See Belton*, 453 U.S. at 460 n. 3, 101 S.Ct at 2864 n. 3 ("Our holding today does no more than determine the meaning of *Chimel's* principles in this particular and problematic conte[x]t."). In *Dean*, the court summarized the flaw in the state's reasoning: "While the bright-line rule announced in *Belton* relieves the police of demonstrating that a particular portion of the passenger compartment is within the 'immediate control' of an arrestee, it does not purport to dispense with all such analysis as to whether the police may search the vehicle at all." *Dean*, 206 Ariz. 158, ¶ 33, 76 P.3d at 437.

FN11. *Robinson* is similarly distinguishable. There, the defendant suggested that his person could not be searched incident to arrest absent independent probable cause to believe contraband or weapons might be found on him. 414 U.S. at 227, 94 S.Ct. at 473. But Gant does not contend that the search here was invalid merely because the state lacked independent probable cause to

believe the search would be fruitful.

¶ 18 *Belton* is readily distinguishable for several other reasons as well. In that case, a *452**385 lone police officer had searched the car contemporaneously with his arrest of the four occupants of the car-none of whom was secured in a patrol vehicle or, apparently, restrained in handcuffs. 453 U.S. at 455-56, 101 S.Ct at 2861-62. Under that scenario, the risk to officer safety posed by the potential presence of any weapons in the arrestee's car was, at the time of the search, pronounced. Here, by contrast, at least four officers were present on the scene, and all three suspects were handcuffed and locked in patrol cars. Moreover, the *Belton* bright-line rule itself includes an express requirement that the search in question be a "contemporaneous incident of th[e] arrest." *Id.* at 460, 101 S.Ct at 2864. Here, although officers searched Gant's car shortly after completing their arrest and securing him in the patrol car, the dangers of the arrest that would trigger the *Chimel* exception to the warrant requirement no longer existed by that time. Thus, the officers did not search Gant's car contemporaneously with his arrest if we define "contemporaneously" with reference to the *Chimel* rationales for permitting a warrantless search at all.[FN12]

FN12. Although we have scrupulously followed the analytical framework compelled by *Dean* for evaluating the issue here, the dissent suggests that we have abandoned the rule it applied in resolving the specific case before it-the recent occupancy test. But the recent occupancy test is designed to assess the constitutionality

of conducting a vehicle search under a *Chimel* rationale when a defendant is no longer within the vehicle at the moment of arrest. Thus, it focuses on the lapse of time between occupancy and arrest. *See Dean*, 206 Ariz. 158, ¶¶ 33-34, 76 P.3d at 437 (finding search unconstitutional because of "the long lapse of time between the arrest and Dean's exit from the vehicle"). Here, the trial court correctly found that Gant was arrested soon enough after his occupancy that a *Chimel* search was not barred on that basis.

But the dissent overlooks that a defendant's recent occupancy of a vehicle is a necessary, but not sufficient, precondition of a valid *Chimel* search of that vehicle. As discussed, the United States Supreme Court also requires that the search be contemporaneous with the arrest. For example, a warrantless search of a vehicle conducted hours or days after an arrest could scarcely be justified on *Chimel* grounds even if the defendant's arrest initially occurred close in time to the defendant's occupancy of the vehicle. *See United States v. Chadwick*, 433 U.S. 1, 11-12, 97 S.Ct. 2476, 2485-86 (1977) (search of footlocker long after defendants were securely in custody improper under *Chimel* rationale). Thus, we neither reject nor overlook the recent occupancy test when we adopt the analytical framework set forth

> in *Dean*. Rather, on this appeal by Gant, we address a different set of facts involving a different specific challenge to the search of a defendant's vehicle. Neither logic nor any language in *Dean* counsels us to resolve this case with exclusive reference to a test inapplicable to the specific challenge raised.

¶ 19 The state has cited cases from both the Ninth Circuit Court of Appeals and other states that have upheld *Belton* searches under circumstances similar or identical to those presented here. And our dissenting colleague cites Arizona authority predating *Dean* to the same effect. In light of our supreme court's scholarly and exhaustive analysis of the requirements set forth in *Chimel* and *Belton* and the clear direction that court has given us thereby, we are not persuaded to follow those cases. *See City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App.1993) ("[W]e are bound by decisions of the Arizona Supreme Court and have no authority to ... disregard them."); *see also Weatherford v. State*, 206 Ariz. 529, ¶ 9, 81 P.3d 320, 324 (2003) ("[S]tate courts are not bound by decisions of federal circuit courts."); *Kotterman v. Killian*, 193 Ariz. 273, ¶ 68, 972 P.2d 606, 624 (1999) (decisions of other state courts are "useful" but "do not control Arizona law"). And we do not believe our supreme court stands alone in its analysis of *Belton* and *Chimel*. As discussed above, several justices of the United States Supreme Court have opined that the application of the *Belton* doctrine under circumstances identical to those here would stretch that case "beyond its breaking point." *Thornton*, 541 U.S. at 625, 124 S.Ct. at 2133 (Scalia, J., concurring); *see also id.* at 624, 124 S.Ct at 2133

(O'Connor, J., concurring) (criticizing lower court decisions that "treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel v. California*.").

¶ 20 The dissenting opinion expresses concern that today's decision will encourage officers motivated to conduct investigations of suspects' vehicles to intentionally conduct *453**386 searches of those vehicles before the arrestees are safely secured. But this reasoning erroneously "assumes that, one way or another, the search must take place." *Id.* at 627,124 S.Ct. at 2134 (Scalia, J., concurring). As Justice Scalia stated in *Thornton*, "conducting a *Chimel* search is not the Government's right; it is an exception justified by necessity to a rule that would otherwise render the search unlawful." *Id.* And nothing about our opinion today would prevent officers from taking whatever steps they believe necessary to protect their safety. *See id.* at 627,124 S.Ct. at 2134-35 (Scalia, J., concurring) ("If 'sensible police procedures' require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search."). We simply hold that a search of an arrestee's vehicle is not one of those steps once the arrestee poses no further risk of gaining access to it.

¶ 21 Our supreme court has instructed us to consider the rationales behind the search incident to arrest exception to the warrant requirement when examining the searches of a vehicle incident to arrest. *Dean*, 206 Ariz. 158, ¶¶ 32-34, 76 P.3d at 437. We have done so and find they were not satisfied when Gant's vehicle was searched. Accordingly, we reverse the trial court's ruling and hold that the evidence seized should be suppressed.

CONCURRING: PETER J. ECKERSTROM, Presiding Judge.

ESPINOSA, Judge, dissenting.

¶ 22 I respectfully dissent. The majority arrives at its conclusion by seizing on *dicta* in *State v. Dean,* 206 Ariz. 158, ¶ 34, 76 P.3d 429, 437 (2003), to, in essence, single-handedly discard the bright-line rule set forth in *New York v. Belton,* 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981), and followed in scores of cases since, including those in Arizona such as *State v. Hein,* 138 Ariz. 360, 365, 674 P.2d 1358, 1363 (1983); *State v. Hanna,* 173 Ariz. 30, 32, 839 P.2d 450, 452 (App.1992); *State v. Hersch,* 135 Ariz. 528, 531, 662 P.2d 1035, 1038 (App.1982); and *Dean* itself, 206 Ariz. 158, ¶ 17, 76 P.3d at 434. In doing so, today's decision effectively attempts to roll back the clock to the previous "disarray" among state and federal courts as to "the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants." *Belton,* 453 U.S. at 459 n. 1, 459, 101 S.Ct. at 2863 n. 1, 2863. This is an outcome neither contemplated nor sanctioned by our supreme court in *Dean,* and I fear this court is getting it wrong for the second time.

¶ 23 The majority essentially ignores that *Dean* expressly adopted the "recent occupancy" test, which determines a vehicle search is within the limits of *Belton* when the defendant is arrested in close proximity to the vehicle immediately after the defendant exits the automobile. *Dean,* 206 Ariz. 158, ¶ 17, 76 P.3d at 434, *citing United States v. Thornton,* 325 F.3d 189, 194-95 (4th Cir.2003), *aff'd, Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004)(*Thornton II*); and *Glasco v. Commonwealth,* 257 Va. 433, 513 S.E.2d 137, 141-42 (1999). Indeed,

the court in *Dean* explicitly held that to be "the correct rule," *id.*, ¶ 30, 76 P.3d 429, and applying it to the facts before it, concluded: "[W]hen, as here, the arrest occurs long after the defendant had left the vehicle and far from the vehicle, the warrant requirement of the Fourth Amendment applies." *Id.* ¶ 34, 76 P.3d 429. The majority disregards that holding, instead contending "the *Dean* court invalidated the search in the case before it precisely because 'neither of the justifications for a warrantless search of the vehicle-protection of the arresting officers and preservation of evidence-[wa]s present.' " ¶ 10, *supra, quoting Dean*, 206 Ariz. 158, ¶ 32, 76 P.3d at 437. But the majority omits the court's key qualifying phrase directly preceding the quoted language, "[*u*]*nder the circumstances of this case*," as well as the court's principal reasoning: Under any reasoned analysis, Dean simply was not a "recent occupant" of the Jeep for *Belton* purposes when he was arrested. He had not occupied the vehicle for some two and one-half hours, and his arrest occurred not in close proximity to the car, but instead inside the house.

****387*454** *Id.* ¶ 32, 76 P.3d 429 (emphasis added). The majority also selectively quotes from *Dean's* fact-bound observation that, in its entirety, reads: "[T]he issue is not whether the defendant has 'evaded' a search by departing the vehicle, but rather whether the totality of the facts still presents the kind of situation that justifies dispensing with the warrant requirement." *Id.* ¶ 34, 76 P.3d 429. It is apparent the language the majority carefully culls from *Dean* simply cannot be separated from the unique facts with which the court was faced, particularly when relied on to avoid the *Belton* rule on the very type of situation and facts that rule was designed to address.

¶ 24 The majority goes on to sidestep *Dean's* true holding by attempting to distinguish the facts at hand from *Belton's* rationale. But it cannot reasonably be maintained that the search of Gant's vehicle a mere "one to three minutes" after Gant had been secured can be considered anything but contemporaneous and proximate to his occupancy of the vehicle and arrest. Gant's car was searched within scant minutes after he exited it, and he was at the scene while the search was conducted. As noted above, the *Dean* court specifically adopted the *Glasco* recent occupancy rule and noted that "concepts such as 'close proximity' and 'immediately after' are of course subject to factual analysis." *Dean*, 206 Ariz. 158, ¶ 30, 76 P.3d at 437, *quoting Glasco*, 513 S.E.2d at 142. The court emphasized it was the combination of Dean's temporal and spatial distance from the vehicle that supported its decision. *Id.*, ¶ 31, 513 S.E.2d 137 ("But we have been able to discover no case, and the State has cited none, in which a search of the passenger compartment of a vehicle was upheld under *Belton* when the driver was arrested as long after he left the vehicle *and* as far from vehicle as was the defendant here.").

¶ 25 The state, in the supplemental brief this court requested, makes a different point that bears mentioning. *Belton's* bright-line rule minimizes the risks inherent in arresting recent occupants of automobiles by permitting police officers to make the arrest and secure the arrestee away from the vehicle before conducting a search. This avoids the greater potential dangers involved in attempting, in the name of *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 2043, 23 L.Ed.2d 685 (1969), alone, to conduct the arrest and search while the occupant is in or near the automobile, which in many instances, the police

physically might be able to do. *See also Thornton II,* 541 U.S. at 621, 124 S.Ct. at 2131 (custodial arrest is "fluid" and danger to police "'flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty'"), *quoting United States v. Robinson,* 414 U.S. 218, 235 n.5, 94 S.Ct. 467, 476 n.5, 38 L.Ed.2d 427 (1973). Today's decision, however, would return Arizona law enforcement officers to the uncertain and dangerous environment in which, "fac[ing] a highly volatile situation," *Thornton II,* 541 U.S. at 621, 124 S.Ct. at 2131, officers must "calculate the probability that weapons or destructible evidence may be involved," *State v. Curiel,* 130 Ariz. 176, 181, 634 P.2d 988, 993 (App.1981); "divert [their] attention to a search while the defendant [i]s free and close at hand," *State v. Kelley,* 107 Ariz. 8, 9, 480 P.2d 658, 659 (1971); and "estimate[ ] ... what items were or were not within reach of an arrestee at any particular moment," *Thornton II,* 541 U.S. at 623, 124 S.Ct. at 2132, in order to do their hazardous jobs. *See Washington v. Chrisman,* 455 U.S. 1, 7, 102 S.Ct. 812, 817, 70 L.Ed.2d 778 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer.")

¶ 26 Contrary to the majority's view, the grave concerns for officer safety do not "assume[ ] that, one way or another, the search must take place," *Thornton II,* 541 U.S. at 627, 124 S.Ct. at 2134 (Scalia, J., concurring), beyond *Belton's* up to now, bright line contours. There is, however, a practical and unfortunate effect of today's decision that will encourage police to search an arrestee's immediate area or vehicle without delay and before he or she is safely secured, precisely the real-world danger that *Belton* and its progeny have sought to ameliorate while balancing the requirements of the Fourth Amendment. *See id.* at 623,124 S.Ct. at

2132; *Kelley,* 107 Ariz. at 9-10, 480 P.2d at 659-60; *Curiel,* 130 Ariz. at 181, 634 P.2d at 993.

¶ 27 Finally, this is not an outcome the trial court could reasonably extrapolate, particularly***455**388** in view of *Dean* and the recent decision by the Supreme Court in *Thornton II,* which involved facts virtually identical to those presented here. Although the majority correctly points out that *Thornton II* addressed a narrower legal question, the majority characterizes the present issue as "far from settled" based on concurring comments not contained in the *Thornton II* plurality opinion. ¶ 12, *supra.* And, while the majority purports to be merely following "the clear direction [the *Dean*] court has given us," it is in my view a backwards journey that *Dean* neither maps out nor supports. ¶ 14, *supra.*

¶ 28 Accordingly, I would uphold the trial court's decision finding the search of Gant's vehicle within the bounds of *Belton, Dean,* and the Fourth Amendment.

APPENDIX C

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE PRO TEMPORE: HON. BARBARA SATTLER CASE NO. CR20000042

COURT REPORTER: NONE DATE December 7, 2004

STATE OF ARIZONA

VS.

RODNEY JOSEPH GANT

RULING

UNDER ADVISEMENT RULING: EVIDENTIARY HEARING

PROCEDURAL HISTORY

Before Defendant's trial, a motion to suppress was heard regarding cocaine uncovered during a search of his vehicle after arrest. The motion was denied and Defendant was convicted following a trial of unlawful possession of a narcotic drug for sale and unlawful possession of drug paraphernalia. He was sentenced to mitigated, concurrent terms, which resulted in a term of imprisonment for three years. Defendant appealed the motion to suppress decision and the Arizona Court of Appeals ruled the trial court improperly denied Defendant's motion. The Arizona State Supreme Court denied the State's petition on the issue and a mandate issued on October 23, 2002. On December 10, 2002, the trial court allowed the State, pursuant to *State v. Million*, 120 Ariz. 10, 588 P.2d 897 (1978), to dismiss the charges against Defendant without prejudice while it pursued an appeal of the adverse suppression ruling.

The US Supreme Court granted the State's petition for certiorari on April 21, 2003. *Arizona v. Gant*, 538 US 976, 123 S.Ct. 1784, 155 L.Ed.2d 664 (2002). Oral argument was set for November of 2003. Pending

argument, the Arizona Supreme Court decided *State v. Dean* 206 Ariz. 158, 76 P.3d 429 (2003) which rejected the Arizona Court of Appeals reasoning in this matter. The scheduled argument in November was vacated by the US Supreme Court and remanded to the Arizona Court of Appeals for reconsideration in light of the *Dean* case. The Arizona Court of Appeals held that the trial court's decision to allow the lawyers to stipulate to a summary of the facts at the motion hearing left an inadequate record of the facts as they related to the two primary issues in *Dean* in determining whether Defendant was a "recent occupant" of the vehicle: proximity to the vehicle when arrested and length of time between when Defendant got out of the vehicle and was arrested.

The matter was remanded to this court to hold an evidentiary hearing and make factual findings pursuant to the *Dean* issues. That hearing was heard on November 1 and 9, 2004. The factual record from that hearing is as follows:

FACTS

On the afternoon of August 25, 1999, [Tucson Police] Officer Griffith knocked on the door of a house on Walnut Street that was under suspicion of being involved in narcotics activity. Defendant answered the door and told the Officer the female owner of the home was not present. He provided the officer information pertaining to his identity. Later in the day, the officer ran Defendant's name to find out he had an outstanding warrant for driving on a suspended license.

That night, officers went back to the house and approached a subject, Jackie White, in the backyard. Mr. White stated he was waiting for a friend. Mr. White was eventually arrested. Shortly after contact with him was made, a female subject pulled in front of the house and contact was made with her. She was ultimately arrested for providing false information to the police. Drugs were found during a search of her person incident to arrest.

While the two aforementioned subjects were handcuffed and placed in police vehicles, Defendant pulled into the driveway in a white car officers recognized

from earlier in the day. Officer Griffith made verbal contact with Defendant immediately after he exited the vehicle. Defendant and the officer stood approximately ten feet from each other, and each traveled about the [sic] half that distance each to meet in the middle. Defendant was told he was under arrest for driving with a suspended license and instructed him to turn around to be cuffed. Defendant complied and was taken into custody. The police then searched his car and discovered cocaine and drug paraphernalia.

ANALYSIS

The US Supreme Court holds that a warrantless search may be made incident to arrest, for either officery [sic] safety concerns or preservation of evidence concerns, of the arrestee's person and the area "within his immediate control." *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). This area has been construed to mean the area from within which the arrestee could gain possession of a weapon or destructible evidence. *Id.* Further, the US Supreme Court has held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as [sic] contemporaneous incident of that arrest, search the passenger compartment of that automobile" and any containers found therein. *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). *Belton* defined the spatial scope of the search that could be conducted, but failed to elaborate on what it meant to be a "recent occupant" of a vehicle. The Arizona Supreme Court tackled the issue in *Dean*.

In *Dean*, the issue was whether a search of an automobile is incident to the arrest of a Defendant. The Defendant in that matter was arrested in a house, approximately 2.5 hours after he had exited his vehicle. The Court held that a warrantless search of an automobile's passenger compartment is allowed when the Defendant is a "recent occupant" of the vehicle, meaning he is arrested in close proximity to the automobile immediately after he exits it. The Court found the 2.5 hour delay between the time Defendant exited his vehicle and when he was arrested did not fall within the Fourth Amendment's "search incident to arrest" exception.

Dean reiterates one of the two key issues in these kinds of situation [sic]: "[A] search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964). This is one of the two main requirements of the recent occupancy test at issue here. To be a recent occupant, the arrestee must have been arrested "in close proximity to the vehicle immediately after the [defendant] exits the automobile." *Dean*, quoting *Glasco v. Commonwealth*, 257 Va. 433, 513 S.E.2d 137 (1999). Hence, there is a spatial and time element to the test.

Dean instructs that in determining whether a search was "substantially contemporaneous" with an arrest of a recent occupant of a vehicle will depend on the facts of each case, noting many cases that have come to various conclusions. *Dean* did not elaborate further, holding that under no reasonable analysis could the facts in that case fit within what was needed for a valid search considering both the distance from the vehicle and the huge lapse of time between when the Defendant exited the vehicle and when he was arrested.

Regarding the "substantially contemporaneous" issue, the 9th Circuit provides some guidance in *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987). In that case, Defendant was arrested after being pulled over on the basis of an outstanding warrant. The police searched the vehicle some 35-40 minutes after Defendant, the lone occupant of the vehicle, was handcuffed and put in a patrol car. The Court found this was too long and not contemporaneous enough to justify a warrantless search incident to arrest. The court noted:

"Simply because the officers had the right to enter the vehicle during or immediately after the arrest, a continuing right was not established to enter the vehicle without a warrant. We do not hold that once an arrestee was handcuffed, all rights to search the vehicle vanish. Rather, the circumstances of the arrest dictate whether the search was proper and conducted contemporaneously after the arrest."

In this case, the Defendant was arrested and handcuffed and his vehicle was searched almost immediately after he was placed in a patrol car. Hence, it appears the first requirement of the recent occupancy test is met as the search was conducted immediately after arrest.

The issue of proximity is next. *Dean* requires the arrestee to be within close proximity of the vehicle at the time of the arrest to be a recent occupant. Police contact need not have been made with the driver before he exits the car. *Thornton v. U.S.*, 124 S. Ct. 2127 (US 2004). In this case, verbal police contact was made immediately after the Defendant got out of the car and he was arrested seconds later when he walked a few feet to meet the officers. When arrested, Defendant was apparently at most 8–10 feet from the car. This would surely constitute "close proximity" and meet this prong of the recent occupancy test.

CONCLUSION

The search in this matter is a valid warrantless search incident to arrest.

IT IS THEREFORE ORDERED that the Motion to Suppress is DENIED.

cc: County Attorney – Mark T. Dieboldt
Thomas Jacobs, Esq.
Under Advisement Clerk

Gerald Bradley
Law Clerk

OPPOSITION BRIEF

FILED
JAN 2 4 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-542

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

-vs-

RODNEY JOSEPH GANT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW.

In *New York v. Belton*, 453 U.S. 454 (1981), this Court held that risks to officer safety and preservation of evidence may create exigent circumstances that permit a contemperaneous, warrantless search of a vehicle when an occupant is arrested. In *Thornton v. United States*, 541 U.S. 615, (2004), this Court held that *Belton* type searches may be conducted if the arrestee is a recent occupant who is no longer in the vehicle at the time of the arrest.

This case presents the question whether the Fourth Amendment permits police to conduct a warrantless search of a vehicle, following the arrest of an occupant or recent occupant, even when the search is not contemporaneous with the arrest such that the twin exigencies of officer safety and evidence preservation no longer exist because the arrest scene and the arrestee are secure, and the arrest has been completed at the time when the search takes place.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent RODNEY JOSEPH GANT respectfully urges this Court to deny the Petition for Writ of Certiorari submitted by the State of Arizona and amicii. The Arizona Supreme Court's decision was well reasoned and is both consistent with this Court's Decisions in *New York v. Belton, supra.*, and *Thornton v. United States*, and with the Fourth Amendment's protections against unreasonable searches and seizures.

OPINION BELOW

On July 25, 2007, the Arizona Supreme Court held that the warrantless search of Respondent's vehicle subsequent to his arrest upon a charge of driving on a suspended license was unreasonable and improper. The court's Opinion is attached to the Petition as Appendix A. The Arizona Supreme Court reasoned that the search was not contemporaneous with the arrest because the arrestee was already secured in the back of a locked police vehicle, and the scene of the arrest was otherwise secure at the time the search was conducted. From these facts, the court concluded that the twin concerns of officer safety and preservation of evidence no longer existed to justify a warrantless search of Respondent's vehicle at the time the search took place.

STATEMENT OF JURISDICTION

On July 25, 2007, the Arizona Supreme Court affirmed the decision of the Arizona Court of Appeals reversing the trial court's denial of Respondent's Motion to Suppress Evidence (Illegal Search), and vacating Respondent's conviction. Respondent acknowledges this Court's jurisdiction as this matter presents a federal constitutional question.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner State of Arizona has unsuccessfully petitioned the Arizona courts to recognize a "bright line" rule that ignores fundamental Fourth Amendment protections against unreasonable searches and seizures. Petitioner has rallied behind the twin exigencies of officer safety, and preservation of evidence. Primarily focusing upon the former, the

Petitioner has argued that the arrest of a recent occupant of a motor vehicle affords the State *unlimited relief from the warrant requirements of the Fourth Amendment* due to the overshadowing concern for the safety of law enforcement officers working the scene of an arrest. What the Petitioner and Amicii wish this Court to overlook, however, are the time-honored principles underlying every warrant exception born of exigency.

A. Material Facts.

Respondent was arrested outside a private residence after he exited his vehicle, closed the door, and met Tucson Police Department (TPD) Officer Griffith in the middle of an open area 8 – 12 feet behind the vehicle. *App. Pet. for Cert.*, C-3. He was immediately handcuffed and secured in a patrol vehicle under the supervision of attending TPD officers. *Id.*. Officers then held Gant in custody until a patrol vehicle arrived so that they could secure him in the vehicle. *Id.* Two other individuals, Mr. White and Ms. Porras, were already in custody when Gant arrived on the scene and was arrested, and Mr. White was secured in a patrol vehicle at the time Gant was arrested. *App.Pet.for Cert.*, A-3, ¶3. Ms. Porras was secured in Officer Ambrose's vehicle. *Id.*

The search of Gant's vehicle was conducted after Gant, and two other arrestees, were already *handcuffed and secured in patrol vehicles*. *Id.*, A-7, ¶13. Gant was placed in Officer Nolan's patrol vehicle before the search, minutes after he was arrested. Id. He was handcuffed, placed in the back of the patrol vehicle and the door was closed and locked from the

outside *such that Gant could not exit*. Id. At that point in time, there were *four or five officers on scene*, and *three people handcuffed and secured* in patrol vehicles. *Id.* The scene was deemed secure at that time, in that there were enough officers present to maintain security of the officers in the area, and to control the area. *Id.* Two arresting officers admitted candidly that, at the time of the search, Gant had no access to anything in his vehicle and was not a threat to that officer or anyone else. *Id.*

B. Proceedings Below.

On January 6, 2000, Respondent Rodney J. Gant was indicted for violations of A.R.S Sec. 13-3408 (Possession of a Narcotic Drug for Sale), a class 2 felony, and A.R.S. Sec. 13-3415 (A) (Possession of Drug Paraphernalia), a class six felony.

On April 25, 2000, Respondent filed a Motion to Suppress the fruits of the post-arrest search of his automobile, and the matter was set for hearing on May 22, 2000. On May 22, 2000, at the original hearing, the parties stipulated to the facts without presenting witness testimony, and Judge Munger tentatively denied Respondent's motion giving leave for the filing of further memoranda. On June 5, 2000, Judge Munger confirmed the denial.

On appeal, Respondent Gant argued, *inter alia*, that the trial court erred in denying his motion to suppress evidence. The Arizona Court of Appeals reversed. See ***State v. Gant***, 202 Ariz. 240, 43 P.3d 188 (App.2002), *cert. granted*, 538 U.S. 976, 123 S.Ct. 1784 (2003), *opinion vacated and remanded.* Although

the Opinion of the Court was later vacated by the Supreme Court in light of *Dean*, the Court of Appeals' analysis was in many ways both sound and instructive, and bears review.

The Court of Appeals held that ***New York v. Belton***, 453 U.S. 454 (1981), "does not extend to this situation" because "Gant voluntarily – that is, not in response to police direction – stopped his vehicle, exited it, and began to walk away from it."[1] In addition, the court stated its agreement with the holdings of other courts that *Belton* did not apply in situations where the arrestee was apprehended outside the vehicle. *Id.* (citing ***United States v. Strahan***, 984 F.2d 15[illegible] (6th Cir. 1993), and ***United States v. Fafowora***, 865 F.2d 360 (D.C. Cir. 1989)). The court agreed that in these circumstances, "the twin concerns of officer safety and evidence preservation that justify, at least theoretically, the search-incident-to-arrest exception to the warrant requirement discussed in ***Chimel v. California***, 395 U.S. 752 (1969), disappear because the vehicle's passenger compartment is not available to the arrestee at the time the police encounter or arrest the person." *Id.* at A-5 to A-6. This portion of the lower court's Opinion drew tacit disapproval of the United States Supreme Court, which remanded the Opinion for review in light of *Dean*.

The Court of Appeals then agreed with

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[1] The court further held that nothing in the record "shows or suggests" that respondent " had seen officers or any other sign of police activity at the residence... either when he arrived at the residence or before he exited his vehicle," and that "the record does not support a finding that Gant was or should have been aware of anyone's approach as he exited his vehicle." *Id.* at A-7.

Respondent Gant's proposition that "*Belton* is limited to the particular factual situation in which it arose. Accordingly, it applies only when 'the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation . . . while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile),'" quoting ***United States v. Hudgins***, 52 F.3d 115, 119 (6th Cir. 1995).

Having concluded that "the narrow *Belton* exception" was inapplicable, *Id.*, the court applied the test announced in *Chimel*. In a single sentence, the court considered and rejected the notion that the search was lawful under *Chimel*, finding that "the passenger compartment of [Gant's] vehicle was not 'within his immediate control' at the time of his arrest." (citing *Chimel*, 395 U.S. at 763). The Court's application of the sound *Fourth Amendment* principles recognized by the United States Supreme Court in *Chimel* is significant, since *Chimel* is the foundation for the warrant exception fashioned in Belton, and later carefully explained by this Court in *Dean*.

This Court denied review without comment. No stay was granted and the State ultimately dismissed the pending case without prejudice.

Petitioner State of Arizona filed a *Petition for Writ of Certiorari* to the United States Supreme Court. The Petition was granted on April 21, 2003, and a briefing schedule set.

On September 15, 2003, the Arizona Supreme Court decided ***State v. Dean***, 206 Ariz. 158, 76 P.3d 429 (2003).

Subsequently, this Court ordered the parties to submit additional briefing regarding the impact of the Arizona Supreme Court's opinion in *Dean* on Mr. Gant's case.

On October 20, 2003, this Court vacated the opinion of the Arizona Court of Appeals in *State v. Gant*, supra., and remanded the case to the Arizona Court of Appeals with instructions to reconsider their decision in light of *Dean*.

On April 30, 2004, the Arizona Court of Appeals remanded the matter to the Pima County Superior Court for further proceedings in order to develop an additional evidentiary record to address the factors set forth in *Dean*, and with instruction to the trial court to reconsider its decision upon the Motion to Suppress in light of *Dean*.

On November 2 & 9, 2004, evidentiary hearings were held before the Hon. Barbara Sattler. At the conclusion of the hearings, Judge Sattler denied the Motion to Suppress. Respondent again appealed. Ultimately, the Arizona Court of Appeals reversed the trial court's ruling, and the Arizona Supreme Court affirmed the reversal on July 25, 2007. *Appendix A, Petition for Writ of Certiorari.*

In its opinion, the Arizona Supreme Court acknowledged the holding of this Court in ***United States v. Robinson***, 414 U.S. 218, 94 S.Ct. 467 (1973), which addressed permissive warrantless searches of persons under arrest. Citing ***Preston v. United States***, 376 U.S. 364, 84 S.Ct. 881 (1964), the court held that the exigency presumed to exist in every arrest situation, temporarily relieving police of the Fourth Amendment's proscription against warrantless searches, does not persist such that police may

continue to ignore Fourth Amendment protections against warrantless searches and seizures after the factors underlying the exigency are not loner present. Simply put, the court held that, once the arrest is complete, and absent some other exception to the Fourth Amendment requirements, a warrant is required before a search may be conducted. *Preston, supra.*, citing ***Chambers v. Maroney***, 399 U.S. 42, 47, 90 S.Ct. 1975, 1978 (1970).

REASONS TO DENY THE PETITION

A. Summary of the Argument

The Arizona Supreme Court correctly applied *Chimel*, *Belton* and *Thornton* to the facts in this case. In doing so, the court correctly recognized what Justice Sanda O'Conner aptly noted in her concurring opinion in *Thornton*: the exigent circumstances recognized by the court in the case of the arrest of a recent occupant of a motor vehicle create a temporary exception to the Fourth Amendment's prohibition against warrantless searches and seizures, *but do not create an absolute and continuing right of law enforcement to conduct a search of the vehicle*. This decision is not contrary to *Belton* and *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127 (2004), and is consistent with the constitutional principles affirmed in ***Chimel v. California***, 395 U.S. 752, 89 S.Ct. 2034 (1969), and distinguished on its facts from *Belton* (as this Court anticipated in that case by limiting that decision to its facts).

Petitioner argues that this Court decided this issue in *Thornton*. However, as the Arizona Supreme Court observed in it's Decision, *Thornton* specifically did not reach the question at issue in this case. See *footnote 2, infra.*, citing Concurring Opinions of Justice O'Conner and Justice Scalia, *Thornton, supra.*

The Arizona Supreme Court correctly interpreted and applied its own decision in ***State v. Dean***. 206 Ariz. 158, 76 P.3d 429, *en banc* (2003), holding that warrantless automobile searches *may* be conducted pursuant to the exception announced in *Belton*. *Dean* was consistent with *Belton*, and held that,

in determining whether such searches are *reasonable* (and therefore constitutional), the court must first determine two things: 1) whether the arrestee was a recent occupant, and, if so, 2) whether the *search* was substantially contemporaneous with the *arrest*.

The analysis of recent occupancy requires that the court determine the amount of time passed since the arrestee last occupied the vehicle prior to arrest, and also the physical distance between the arrestee and the vehicle at the time of the arrest.

Once it is determined that an arrestee was a recent occupant of an automobile, which is not at issue in this case, the court must determine *whether the search of that vehicle was "substantially contemporaneous" with the arrest.* This analysis requires a determination whether, under the "totality of the facts," the twin concerns of officer safety and preservation of evidence initially posed by the arrestee's recent occupancy of his vehicle are still present when the search is ultimately conducted. If those concerns are not present, and there is otherwise no probable cause to search the vehicle, a warrant is required.

B. Argument

The Arizona Supreme Court was correct in its application of *Chimel*, *Belton* and *Thornton*. Petitioner erroneously clings to outdated Fourth Amendment dogma by suggesting that *Belton*'s "bright line" permits warrantless searches of vehicles, without probable cause, based upon the arrest of a recent occupant, even after the arrest has been completed and all exigent circumstances presumed by *Chimel* to exist have been addressed and neutralized.

Petitioner's interpretation of our Constitutional Fourth Amendment requirements abandons fundamental Fourth Amendment protections by relieving police of any obligation to demonstrate that the exigent circumstances presumed to arise out of every arrest situation continue to persist once the arrest has been completed. This Court should deny Petitioner's application for Writ of Certiorari because Petitioner's argument is based upon a misapprehension of Fourth Amendment law.

I. PETITIONER'S ANALYSIS ABANDONS FOURTH AMENDMENT PROTECTIONS BY MISAPPLYING *CHIMEL* AND *BELTON*.

Petitioner's analysis first overlooks the fact that warrantless searches are presumptively unreasonable, and will be deemed improper absent a valid exception based upon exigency. ***Chimel v. California***, 395 U.S. 752, 89 S.Ct. 2034 (1969). The Courts in *Chimel* and in ***New York v. Belton***, 453 U.S. 454, 101 S.Ct. 2860 (1981), specifically addressed the practical exigency related to preservation of evidence from destruction *by the arrestee* and protection of officers from weapons *in the arrestee's possession or reasonably within the arrestee's immediate reach*. *Belton* at 460, 101 S.Ct. 2862; *Chimel*, 395 U.S. at 768, 89 S.Ct. 2034. The cautionary remarks in *Belton* emphasize that, by recognizing these exigencies, the Court did not intend to eviscerate Constitutional protections against unreasonable searchs:

> "Our holding today does no more than determine the meaning of *Chimel*'s

> principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrest. *Id.* at 460, n. 3.

The analysis applied by the Arizona Supreme Court in the instant case was an extension of the sound logic applied by the court in ***State v. Dean***, 206 Ariz. 158 (2003).[2] It is important to understand the court's decision in that case, since the case at bar presented the Arizona Supreme Court with two competing interpretations of *Dean*'s holding. *Dean* examined the specific question of when a vehicle search may be deemed "incident to arrest." *Dean*, 206 Ariz. 158 at 160 & 161. The Court relied heavily upon citation to *Chimel*, *supra.*, emphasizing that 1) *"[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible,"* (citing *Chimel*, 395 U.S. 752 at 762, 89 S.Ct. 2034 at 2034) and 2) that the whole basis for the warrant exception in this circumstance was *the practical need to prevent access to weapons or evidence within an arrestees immediate control*. Id., 206 Ariz. 158 at 161-162. The Court also emphasized Justice Stewart's cautionary remark in *Belton* that "the Court was not retreating from *Chimel*, but rather simply applying its principles to the particular problem before it."

The *Dean* court began its analysis by emphasizing the need for reasonable searches of

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[2] This Court previously remanded this case for reconsideration by the Arizona Court of Appeals in light of *Dean*.

persons under arrest and the area within the arrestee's immediate control, clearly defining the purpose of the exception:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule."

206 Ariz. at 162. Next, the court acknowledged that *Belton, supra.*, defined only the scope of a permissible search of a vehicle when the arrestee is a "recent occupant," so that courts and officers in the field would not be burdened with the difficult task of determining precisely what areas of a vehicle were accessible to the occupant. Id. The court observed that *Belton*'s holding "did not undertake to define recent occupancy, other than to note in the case before it that the search occurred immediately after the arrest and that Belton was a passenger in the car "just before he was arrested." *Id.* at 163.

After stating the test for recent occupancy (which was the same analysis later adopted by this Court in *Thornton*), the court next addressed the critical determination whether a search is substantially contemporaneous with the arrest. The court ultimately held that Dean was not a recent occupant because he had not been in his vehicle for 2 ½ hours preceding his arrest. The court further noted that Dean was arrested in his house, not in close proximity to the vehicle. The court therefore concluded that "[U]nder the circumstances of this case, neither of the justifications for the warrantless search of the vehicle – protection of the arresting officers and preservation of evidence – is present." Id., at 166.

While *Dean* emphasized that two critical factors in the analysis of "recent occupancy" are time and distance, the court went on to explicitly include in its holding a requirement that trial courts engage in a further analysis whether the exigencies permitting a vehicle search upon arrest of an occupant (or recent occupant) persist when the search is conducted:

> "Because, as *Chimel* and *Belton* teach, the Constitution requires a warrant except under those exigencies that allow otherwise, the issue is not whether the defendant has "evaded" a search by departing the vehicle, but rather *whether the totality of the facts still presents the kind of situation that justifies dispensing with the warrant requirement*." (emphasis added)

Dean, 206 Ariz. 158 at 166.

Like the holding in *Dean*, the Arizona Supreme Court's holding in this case adopts a practical, totality of the facts approach emphasizing fundamental Constitutional principles, which is consistent with prior Arizona holdings and prior decisions of this Court. See **State v. Madden**, 105 Ariz. 383, 384, 465 P.2d 363, 364, en banc (1971), citing **Preston v. United States**, 376 U.S. 364, 366, 84 S.Ct. 881, 883 (1964)(arrestees in custody in police car, already removed from scene of arrest, had no access to vehicle, and search improper even though arrestees were in vehicle when seized). Once more emphasizing fundamental Constitutional principles, the **Madden** Court went on to hold that in all situations searches of automobiles made incident to arrest are limited by the principle that police must, whenever practicable, obtain a judicial warrant. Id. See, e.g., **State v. Snyder**, 12 Ariz.App. 103, 467 P.2d 943 (App.1970)(arrestees outside of vehicle and in the custody of other police officers had no control over it, and there was sufficient time to obtain a warrant and no overriding necessity to search the vehicle without a warrant).

II. PETITIONERS' INTERPRETATION OF *BELTON* IS FUNDAMENTALLY FLAWED, IMPUTING A "BRIGHT LINE" RULE WHERE NONE EXISTS.

Petitioner argues that the Arizona Supreme Court's decision in this case would dismantle the "bright line" rule fashioned in *Belton*. Petitioner's argument misapprehends *Belton*'s intent, and advocates an exception that would swallow the rule.

The misapprehension is a fundamental flaw in Petitioner's argument.

As the Arizona court explained in this case, *Belton*'s "bright line rule" is that of the *scope of the search*, not the threshhold question whether the search is permissible; a fact that is always subject to judicial review. *Appendix to Petition for Certioari*, A-6. ¶12. Under *Belton*'s holding, once a person is determined to be a recent occupant of a motor vehicle, law enforcement officers affecting an arrest of that person may search the passenger compartment and containers located inside the passenger compartment of the motor vehicle, without making a specific showing that there is a likelihood that either contraband or weapons may be located therein, and without having to determine exactly *what portion of the passenger compartment* was actually within the reach of the arrestee. *C.f.* ***United States v. Osife***, 398 F.3d 1143 (CA9 2005). However, ever since *Belton* was decided, courts have routinely analyzed 1) whether police correctly determined that a person was a recent occupant of a motor vehicle, and 2) whether a search was substantially contemporaneous with the arrest of a recent occupant. See, e.g., *Madden, Preston* and *Snyder*, *supra*.; ***State v. Eckel***, 185 N.J. 523, 540 888 A.2d 1266, 1276 (N.J. Sup.Ct. 2004)(Criticizing broad construction of *Belton* as contrary to Constitutional protections); ***State v. Dunlap***, 185 N.J. 543, 888 A.2d 1278 (N.J. Sup. Ct. 2006)(Holding that, under New Jersey's Constitution, twin concerns of officer safety and evidence preservation insufficient to justify search where there was no objective threat to support either concern). It is this latter factor that is the focus of this case.

The Arizona Supreme Court's decision in this case is consistent with *Belton* in every respect. It is Petitioner's overreaching analysis that seeks to "overrule" *Belton*'s rationale. Petitioner further misapplies this Court's holding in *Thornton* by implying a conflict with that decision. As the Arizona Supreme Court specifically observed, *Thornton* did not reach the issue whether the search in that case was contemporaneous with the arrest. *App.Pet.Cert.*, A9-A10, ¶18 & 19. The *dicta* in *Thornton* cited by Petitioner suggests only that police need not demonstrate that the passenger compartment of an arrestee's vehicle is actually accessible to the arrestee such that the scope of the search should be narrowed. *Belton*, of course, specifically resolved this issue by defining the scope of the permissible search, so that police would not have to guess at what might be reached by an arrestee in a fluid arrest situation. *Belton* in no way authorized a continued warrantless search that was not contemporaneous with the arrest. Thus, once the arrest is complete, and the exigency dissipated, *Belton* no longer applies, and (absent probable cause) a warrant is required.

Petitioner cites several cases from various jurisdictions that have analyzed this issue, both before and after *Thornton*. Petitioner cites these cases in support of the proposition that most state and federal courts support Petitioner's position. However, the citation of these authorities is not helpful.

The Arizona Supreme Court acknowledged that many courts have upheld searches in cases factually similar to Gant's, but expressed an intent to adhere to basic Fourth Amendment principles, without specifically addressing the applicability of

the cited authorities to the issue under review. *App.Pet.Cert.* A-11, ¶19. An analysis reveals that most of the cited cases did not directly address the issue at bar.[3] Others proposed different factual scenarios and lacked a record establishing a secure arrest scene at the time the search was conducted.[4] Furthermore, many of those courts cited to cases that have at times upheld, and at times held as unlawful vehicle searches conducted varying amounts of time after an arrest,

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[3] *See, e.g.* ***United States v. Mapp***, 476 F.3d 1012 (D.C. Cir. 2007) (addressing recent occupancy issue, and upholding vehicle search 10 minutes after arrest, noting courts have upheld searches 10 - 15 minutes after arrest as lawful, while other courts have held searches 30 minutes after arrest unlawful); ***United States v. Osife***, 398 F.3d 1143 (9th Cir.2005)(defendant/appellant conceded search was incident to arrest, but argued that *Thornton* limited searches to cases where weapons or contraband might reasonably be expected to be found in vehicle); ***United States v. Herndon***, 393 F.3d 665 (6th Cir. 2005) (addressing only issue whether defendant was recent occupant if he was outside his vehicle when arrested); ***United States v. Barnes***, 274 F.3d 601 (8th Cir.2004)(deciding only that *Belton*'s bright line rule precludes need to demonstrate arrestee could reach items in passenger compartment at the time of his arrest in order to permit search; not addressing contemporaneous nature of search); ***United States v. Karlin***, 852 F.2d 968 (7th Cir.1988)(same); ***Northrop v. Trippett***, 265 F.3d 372 (6th Cir.2001)(same); ***United States v. McCrady***, 774 F.2d 868 (8th Cir.1985)(same); ***United States v. Cotton***, 751 F.2d 1146 (10th Cir.1985)(same); ***United States v. White***, 871 F.2d 41 (6th Cir.1989)(upholding search under *Belton* even where arrestee was no longer within reach of vehicle; distinguishing cases where exigency may be demonstrated no longer to exist. *C.f.* ***United States v. Vasey***, 834 F.2d 782 (9th Cir.1987)(applying case-by-case analysis of exigencies when search is conducted and finding no exigency existed to support search after arrestee removed from scene).

[4] *See, e.g.* ***United States v. Weaver***, 433 F.3d 1104 (9th Cir. 2006)(Upholding search 15 minutes after arrest when arrestee was handcuffed in patrol car, but other vehicle occupants were nearby seated on curb; officer waited to summon sufficient backup officers for a "safe search," discussing only time of delay and not exigencies).

suggesting that lower courts are already acknowledging and applying a case-by-case analysis, examining the circumstances of each arrest and search, where Petitioner erroneously suggests a "bright line" rule already exists.[5]

III. THE RECORD IN THIS CASE CLEARLY DEMONSTRATES THAT THERE WAS NO EXIGENCY PRESENT AT THE TIME OF THE SEARCH, SUCH THAT ANY PERSON POSED A REASONABLE RISK OF (A) ENDANGERING AN OFFICER'S SAFETY BY GAINING ACCESS TO ITEMS IN THE VEHICLE OR (B) DESTROYING EVIDENCE IN THE VEHICLE.

Petitioner's interpretation of *Belton*'s "bright line" rule would create a perpetual exigency, extending from the time of arrest until police conduct a search of the arrestee's vehicle. In effect, Petitioner argues that the arrest of a vehicle occupant (or recent occupant) creates a right vested in law enforcement to conduct a search, and that such right exists for an indefinite period. However, authorities cited by Petitioner demonstrate that every jurisdiction has placed limitations upon the period of time during which a Belton search may be conducted. When imposing this limitation, our courts are consistently mindful of one thing: whether the circumstances of

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[5] *See e. g.* ***United States v. Hrasky***, 453 F.3d 1099 (8th Cir. 2006) (Upholding search onehour after arrest, and holding that focus should be "not strictly on the timing of the search but its relationship to (and reasonableness in light of) the circumstances of arrest."); ***Weaver***, *supra*, (upholding search 15 minutes after arrest where officer waited for backup to conduct "safe search").

the arrest, when viewed together with the circumstances of the search itself manifest an exigency as required by the Fourth Amendment. *See, e.g., Mapp, Hrasky and Weaver, supra.*

Applying this type of analysis, the Arizona Supreme Court and Arizona Court of Appeals both determined that there was insufficient evidence before the trial court to support a finding that Respondent Gant, or any other person at the scene, posed a reasonable risk of endangering the officers' safety by accessing items in the vehicle, or destroying evidence in the vehicle. Therefore, the search of Gant's vehicle was not reasonable, because it had to be predicated upon a warrant exception *specifically designed to address those concerns*.

Respondent exited his vehicle, closed the door, and met Officer Griffith in the middle of an open area 8 – 12 feet behind the vehicle, where he was immediately arrested and secured in a patrol vehicle under the supervision of attending TPD officers. Officers then held Gant in custody until a patrol vehicle arrived so that they could secure him in the vehicle. Two other individuals, Mr. White and Ms. Porras, were already in custody when Gant arrived on the scene and was arrested, and Mr. White was secured in a patrol vehicle at the time Gant was arrested. Ms. Porras was secured in Officer Ambrose's vehicle.

The search of Gant's vehicle was conducted after Gant, and two other arrestees, were already *handcuffed and secured in patrol vehicles*. Gant was placed in Officer Nolan's patrol vehicle before the search, approximately six (6) minutes after he was arrested. He was handcuffed, placed in the back of the

patrol vehicle and the door was closed and locked from the outside *such that Gant could not exit*. At that point in time, there were *four or five officers on scene*, and *three people handcuffed and secured* in patrol vehicles. The search commenced approximately one (1) minute after Gant was placed in a patrol vehicle. The scene was deemed secure at that time, in that there were enough officers present to maintain security of the officers in the area, and to control the area. Two arresting officers admitted candidly that, at the time of the search, Gant had no access to anything in his vehicle and was not a threat to that officer or anyone else.

It requires no deep analysis to conclude that the warrantless search in this case was not justified under the *Belton* exception. Two officers candidly admitted that Gant was no threat to them at the time of the search as he was secured in a locked police vehicle. Those same officers stated that the scene was secure when the search was conducted, since the other two arrestees were likewise handcuffed and secured in vehicles, and several officers were present to secure the area. Since there was no chance of anyone obtaining a weapon or evidence from Gant's vehicle at the time of the search, there was no exigency and a warrant was required.

Based upon the foregoing facts, Gant's close proximity to his vehicle when arrested is of no moment. Neither is the fact that the search was conducted 5 – 6 minutes after the arrest was effected. Considering the twin concerns of officer safety and preservation of evidence, and applying a totality of the circumstances" or "totality of the facts" test to this case, distance and time become irrelevant because the

State's own officers present on the scene themselves acknowledged that there was no exigency. Where there is no reasonable threat, there is no exigency, and the warrantless search must be deemed invalid as pretextual..

At the evidentiary hearing on November 9, 2004, the Petitioner presented evidence intended to establish that no crime scene is ever "secure" such that a vehicle search conducted pursuant to the *Belton* exception would be unwarranted. See TR 11/9/04, pp.18-20. In this case, the Petitioner's examination suggested that the possibility of return of the property resident, or sudden and unexpected appearance of unknown civilians presented a constant threat to officer safety. The testimony elicited was almost rehearsed, and contradicted the testimony of officers on scene that described the scene as secure at the time of the search, and denied any threat to officer safety or evidence. A finding that every crime scene presents inherent danger, and thus justifies a vehicle search incident to arrest of a recent occupant would eviscerate decades of holdings that support the Constitutional principles recognized by this Court in *Chimel* and *Belton*.

It is worth recalling that *Belton* involved a situation wherein a single officer detained six individuals by the side of the road. Having arrested the driver of the vehicle for a drug offense, the officer searched the passenger compartment of the vehicle. The search was permissible since 1) there were six detainees and only one officer at the scene, 2) the officer had only one set of handcuffs and could not secure all detainees, and 3) all detainees practically had access to the vehicle since the single officer could

not hope to control them all.

In the case of Mr. Gant, there were four officers on scene and three individuals under arrest. All arrestees were handcuffed and secured in police vehicles before the search commenced. At the time of the search, six minutes after Gant was arrested, the scene was secure and there was no objective threat presented by Gant or any others present at the scene. There was no justification for the warrant exception created by *Belton*. In fact, there was no reason by officers could not have requested a warrant, excepting that they had no probable cause to obtain one.[6] This case is strikingly similar to the case of *State v. Dunlap* case, *supra.*, in which the New Jersey Court of Appeals and New Jersey Supreme Courts reached identical conclusions, and found that an unreasonably broad application of *Belton* turns Fourth Amendment protection on its head and causes the warrant exception to swallow the rule.

IV. CONCLUSION

Belton created a "bright line" rule addressing the permissible scope of vehicle searches under *Chimel*. Neither case removed from judicial review the threshold question whether a search is permissible in the first place. The Arizona Supreme Court's decision in this in no way impinges upon the holding in *Belton*, and is entirely consistent with both *Chimel* and *Belton*.

The Arizona courts correctly applied a totality of the facts/circumstances approach to the *Belton*

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[6] The parties agree that there was no probable cause to search Gant's vehicle.

exigency analysis. This analysis focuses on the twin concerns of officer safety and preservation of evidence, and requires that the trial court consider all of the facts available, not merely those pertaining to distance of an arrestee from the vehicle searched at the time of arrest, or the passage of time between the arrest and the search. This straight forward application of Fourth Amendment principles addresses the concerns expressed by Justices Scalia and O'Conner in their concurring opinion in *Thornton*, *supra*.

Application of the totality of the facts/circumstances analysis to the present case results in only one possible conclusion: no exigency existed to invoke either the *Chimel* or *Belton* exceptions to the Fourth Amendment's warrant requirement. When the search was conducted, the arrest scene was secure, several officers were present and did not themselves believe they were in any danger, and no one had any chance of accessing Gant's vehicle, or its contents, other than the officers themselves. Simply put, at the time police conducted their search, the arrest was complete, and the scene secure. The process has moved to an investigative stage, and police sought not to protect themselves or any evidence, but instead to discover evidence under the guise of an exigency that no longer existed. The search was therefore unreasonable under the Fourth Amendment.

There is no "right" to search that is created by exigency; only a temporary exception to the general rule. "It is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se*

unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.'" ***Mincey v. Arizona***, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (quoting ***Katz v. United States***, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). One such exception permits the warrantless search of a vehicle's passenger compartment "as a contemporaneous incident" of the arrest of that vehicle's occupant or recent occupant. *Belton*, 453 U.S. at 460-61, 101 S.Ct. 2860. Although "[s]uch searches have long been considered valid because of the need 'to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape' and the need to prevent the concealment or destruction of evidence," *id.* at 457, 101 S.Ct. 2860 (quoting ***Chimel v. California***, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)), it is equally well-established that "[s]earches incident to arrests are not limitless." ***United States v. Pratt***, 355 F.3d 1119, 1121-22 (CA8 2004). Instead, they are to be treated as the *exception* to Constitutional norms that they are, lest officers in the field treat them as a "police entitlement." ***Thornton v. United States***, 541 U.S. 615, 624, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (O'Connor, J., concurring); ***United States v. Barnes***, 374 F.3d 601, 605 (8th Cir.2004) (Smith, J., dissenting), *cert. denied*, 543 U.S. 1079, 125 S.Ct. 938, 160 L.Ed.2d 822 (2005); *see also Thornton*, 541 U.S. at 627, 124 S.Ct. 2127 (Scalia, J., joined by Ginsburg, J., concurring) ("But conducting a *Chimel* search is not the Government's right; it is an exception-justified by necessity-to a rule that would otherwise render the search unlawful."). Although the Supreme Court has

made it clear that courts are not to determine on a case-by-case basis whether or not one of the *Chimel* justifications was present, *Belton,* 453 U.S. at 459, 101 S.Ct. 2860 (quoting ***United States v. Robinson,*** 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)), it nonetheless remains the government's burden to establish its entitlement to the search incident to arrest exception; if the government fails to make such a showing, the evidence must be suppressed. *See* ***Coolidge v. New Hampshire,*** 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Based upon the record in this case, there was insufficient evidence to conclude that, at the time of the search, either the Respondent or any other person at the scene (other than the officers themselves) posed a reasonable risk to officer safety by accessing items in the vehicle, or destroying evidence in the vehicle. The Arizona courts were correct in their decisions, and this Court should deny Petitioner's application for Writ of Certiorari.

Respectfully Submitted,

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REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

VS.

RODNEY JOSEPH GANT,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Gant urges this Court to deny certiorari because the Arizona Supreme Court's decision is consistent with this Court's decisions in *New York v. Belton*, 453 U.S. 454 (1981), and *Thornton v. United States*, 541 U.S. 615 (2004). He claims that the State of Arizona "clings to outdated Fourth Amendment dogma" by contending that this Court established a bright-line rule in *Belton* that police may search the passenger compartment of an automobile incident to the recent occupant's arrest without regard to whether the justifications for the search-incident-to-arrest exception to the warrant requirement actually exist in any given case. Brief in Opposition at 10. But that "outdated Fourth Amendment dogma" is the understanding of every federal circuit court and state appellate court—with the exception of the Arizona Supreme Court—to consider the application of *Belton* and *Thornton* to situations like Gant's. Petition for Writ of Certiorari at 15–17.

Gant's arguments for denying certiorari fundamentally misunderstand this Court's Fourth Amendment jurisprudence and ignore the havoc that the Arizona Supreme Court's decision wreaks upon police officers' ability to safely conduct arrests while consistently applying Fourth Amendment principles to searches of automobiles incident to the arrest of the recent occupant. The Arizona Supreme Court's case-by-case approach to searches incident to arrest mires police in "'[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions,'" *Belton*, 453 U.S. at 458 (quoting

Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. Ct. Rev. 127, 142), that they must apply "on the spur (and in the heat) of the moment," *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Because the Arizona Supreme Court's decision rejects *Belton*'s bright-line holding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile," 453 U.S. at 460, this Court must grant certiorari to reaffirm that holding.

I. A *Belton* Search Is Reasonable Under the Fourth Amendment Regardless Whether the Justifications for the Search-Incident-to-Arrest Exception Actually Exist in a Given Case.

Gant argues that the Arizona Supreme Court correctly held that the police can search the passenger compartment of an automobile incident to the recent occupant's arrest only when the justifications for the search—the need to protect the arresting officers' safety and the need to preserve evidence from destruction—actually exist at the time of the search because only the existence of those justifications makes the warrantless search reasonable. Brief in Opposition at 11–15. Gant's

argument is inconsistent with this Court's Fourth Amendment jurisprudence.[1]

"The touchstone of the Fourth Amendment is reasonableness." *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 2201 n.4 (2006). Whether a search is reasonable despite the lack of a warrant requires "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). Although a warrantless search must be "'strictly circumscribed by the exigencies which justify its initiation,'" *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (quoting *Terry v. Ohio*, 392 U.S. 1, 25–26 (1968)), the justifications for the search may be of such a character that requiring proof of its existence in every case defeats the justification.

This Court has come to that conclusion with two exceptions to the warrant requirement: the automobile exception and the search-incident-to-arrest exception. An automobile's "ready mobility" is "an exigency sufficient to excuse failure to obtain a

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[1] Gant relies extensively on the Arizona Supreme Court's decision in *State v. Dean*, 76 P.3d 429 (Ariz. 2003), for his analysis that the justifications for a search incident to arrest must exist in every case. Brief in Opposition at 11–14. *Dean* does not apply, however. In *Dean*, the Arizona Supreme Court held that the "initial contact rule"—the rule this Court rejected in *Thornton*—was an improper test for determining whether a person was a "recent occupant" for purposes of a *Belton* search. 76 P.3d at 436, ¶ 27.

search warrant once probable cause is clear." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam). The police do not have to prove in each case that the automobile's mobility required them to search it without first obtaining a warrant: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Id.*; *see also Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (per curiam) (reversing state supreme court decision invalidating automobile search because no exigency actually existed).[2]

The same is true regarding searches incident to arrest. The justifications for allowing police to search a person incident to the person's arrest are the need to disarm the person and to preserve evidence on his person. *United States v. Robinson*, 414 U.S. 218, 234 (1973). In *Robinson*, this Court rejected the lower court's "suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Id.* at 235. In *Belton*, this Court extended this principle to searches of the passenger compartment of automobiles incident to the recent occupant's arrest by favorably quoting *Robinson*'s statement that while a search incident to arrest is "'based upon the need to

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[2] Consequently, Gant errs in claiming that "in all situations searches of automobiles are limited by the principle that police must, whenever practicable, obtain a judicial warrant," Brief in Opposition at 15 (citing *State v. Madden*, 465 P.2d 363 (Ariz. 1971)).

disarm and to discover evidence,'" it "'does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.'" 453 U.S. at 461 (quoting *Robinson*, 414 U.S. at 235).

Contrary to Gant's claim, upholding the validity of a *Belton* search without requiring proof of the presence of the underlying justifications for a search incident to arrest does not abandon the principles of the Fourth Amendment, it follows those principles. The Arizona Supreme Court's failure to follow these principles warrants the granting of the writ of certiorari.

II. *Belton* Established a Bright-Line Rule that the Police May Contemporaneously Search the Passenger Compartment of an Automobile Incident to the Recent Occupant's Arrest; It Did Not Merely Define the Scope of the Search.

Gant argues that this Court did not establish in *Belton* a bright-line rule that the police may contemporaneously search the passenger compartment of an automobile incident to the arrest of the recent occupant. Brief in Opposition at 15. According to Gant, in *Belton* this Court merely held that the *scope* of a search incident to arrest extended to the passenger compartment, without deciding *if* such a search was appropriate in any given case. *Id.* at 16. The problem with Gant's argument is that no court—other than the Arizona Supreme Court in this case—has ever so interpreted *Belton*.

This Court stated its holding clearly: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton*, 453 U.S. at 460. This Court subsequently noted in *Michigan v. Long* that *Belton* had established a bright-line rule: "[T]he 'bright line' that we drew in *Belton* clearly authorizes [a search of an automobile] *whenever* officers effect a custodial arrest." 463 U.S. 1032, 1049 n.14 (1983) (emphasis added). This Court reaffirmed its bright-line rule in *Thornton* in direct response to the defendant's argument that his automobile did not fall within *Belton*'s ambit because he could not reach his automobile at the moment of the search:

> The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.

Thornton, 541 U.S. at 622–23.

Every federal and state appellate court that has considered the application of *Belton* and *Thornton* has understood *Belton*'s holding and meaning. Petition for Writ of Certiorari at 15–17. Even the

majority of the Arizona Supreme Court in this case recognizes that it is out of step with the general understanding of *Belton*: "We are aware that most other courts presented with similar factual situations [to Gant's] have found *Belton* and *Thornton* dispositive." Pet. App. A at 11, ¶ 21.

Gant's argument to the contrary is not credible. Gant cites to two New Jersey appellate court decisions for the proposition that *Belton* should not be interpreted as broadly as the State of Arizona contends. Brief in Opposition at 16. But those decisions, unlike the decision in this case, were decided under the state, not federal, constitution. *See State v. Dunlap*, 888 A.2d 1278, 548 (N.J. 2006) (validity of search judged under New Jersey Constitution); *State v. Eckel*, 888 A.2d 1266, 1277 (N.J. 2006) (same). Moreover, the New Jersey Supreme Court recognizes that *Belton* established a bright-line rule under the federal constitution. *Eckel*, 888 A.2d at 1274.

This Court established in *Belton* a bright-line rule that police may contemporaneously search the passenger compartment of an automobile incident to the arrest of the recent occupant. The Arizona Supreme Court's refusal to follow this Court's precedent warrants the granting of certiorari.

III. The Existence of Exigent Circumstances Does Not Determine the Contemporaneity of the Search.

Gant appears to argue that because no exigencies existed in his case at the time of the search—because

he was handcuffed in the back of a patrol car—the search of his car was not contemporaneous with his arrest. Brief in Opposition at 19–20. But while the police must conduct a *Belton* search contemporaneously with the arrest, the presence or absence of the underlying justifications for the search does not determine whether the search is contemporaneous.

This Court noted in *Belton* that the New York Court of Appeals had held that the search of Belton's jacket was not incident to his arrest because the police had "exclusive control" over it when they seized it. 453 U.S. at 461 n.5. This Court rejected this "fallacious" analysis, explaining that under that theory, "no search or seizure would ever be valid." *Id.* The same analysis holds here. If by handcuffing or otherwise securing the defendant the police gain exclusive control over the defendant's automobile, thereby obviating any justification for a search of the automobile, no search of the automobile would ever be valid, and this Court's analysis in *Belton* would be meaningless. The presence or absence of the justifications for the search-incident exception does not determine the contemporaneity of the search.

Regardless whether any actual exigencies existed at the time that the police searched Gant, no question exists that the police searched Gant's automobile contemporaneously with his arrest. The police arrested Gant within eight to twelve feet of his automobile, Pet. App. A at 3, ¶ 3, and the search of his automobile occurred within one to three minutes of the arrest. Pet. App. B at 5, ¶ 5.

* * *

None of Gant's arguments change the fact that the Arizona Supreme Court refused to follow this Court's clear precedent in *Belton* and *Thornton*. By its own admission, the supreme court stands alone in failing to do so. Its decision creates confusion and danger by requiring police officers to conduct a case-by-case evaluation in the field whether the exigencies attendant on an arrest are present. This puts police officers at risk and provides no clear guidelines for preserving arrestees' rights against unreasonable searches and seizures. Because the Arizona Supreme Court has flouted this Court's authority and created danger for police and public alike, this Court should grant certiorari and reverse.

CONCLUSION

For these reasons, the State of Arizona respectfully requests that this Court grant certiorari, reverse the *Gant* opinion, and hold that the search of Gant's car incident to his arrest was constitutional under *Belton* and *Thornton*.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-542

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2007

STATE OF ARIZONA,
Petitioner,
v.
RODNEY JOSEPH GANT,
Respondent,

On Petition For Writ Of Certiorari
To The Arizona Supreme Court

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, THE STATE OF ARIZONA BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

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In The
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STATE OF ARIZONA

Petitioner,

v.

RODNEY JOSEPH GANT

Respondent.

On Petition For Writ Of Certiorari
To The Arizona Supreme Court

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, THE STATE OF ARIZONA BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing in support of the petition for a writ of certiorari to review the judgment of the Arizona Supreme Court as the authorized law officer of the county, pursuant to Supreme Court Rule 37.2(a) and 37.4.[1]

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1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board of Commission.

(Footnote omitted.) It is provided in the California general law that:

(continued...)

INTEREST OF AMICUS CURIAE

Amicus curiae, as the executive officer charged with the prosecution of crime in the most populous county in California, has a strong interest in the effective enforcement of the laws of the state. Prior to this Court's bright-line ruling in *New York v. Belton*, 453 U.S. 454 (1981), the scope of a search of a vehicle incident to a lawful arrest was in a constant state of confusion.[2] The Arizona Supreme Court's holding in *State v. Gant*, 162 P.3d 640 (Ariz. 2007), abandons this Court's bright-line ruling in *Belton*, reverting to a case-by-case analysis of whether a scene was secure and therefore a search incident to a lawful arrest was not justified.

Retreat from this Court's straightforward holding in *Belton* will return the state of the law to a time when neither the citizenry nor law enforcement know the scope of an

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(...continued)

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Gov't Code § 26500 (West 1998).

2. *See People v. Fick*, 107 Cal.App.3d 892, 895 (1980) ["Certain closed containers, such as luggage and briefcases, clearly fall within the Fourth Amendment's proscription against warrantless searches because they are "common [repositories] for one's personal effects [and are] inevitably associated with the expectation of privacy." *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979) (quoting *United States v. Chadwick*, 433 U.S. 1, 13 (1977)). Other items, however, are not reasonably associated with an expectation of privacy, and containers whose primary use is something other than as repositories for personal effects do not normally raise reasonable expectations of privacy. (*Guidi v. Superior Court* (1973) 10 Cal.3d 1, 10-14...paper shopping bag; *People v. Diaz* (1980) 101 Cal.App.3d 440, 446-448...paper cup with lid; *People v. Scott* (1979) 95 Cal.App.3d Supp. 8, 11...cigarette box."].

officer's authority, hampering an officer in the effective performance of his duties to enforce the laws of the state and uncover and deter criminal activity. It is therefore in the interest of amicus to urge that certiorari be granted.

SUMMARY OF ARGUMENT

A search of a person incident to a lawful arrest is well-settled. *United States v. Robinson,* 414 U.S. 218, 227 (1973). Balancing the more limited privacy expectation that an arrestee has in a vehicle being driven on a public highway, and who has been taken into physical custody based upon probable cause, versus the legitimate needs of law enforcement to be able to search a highly mobile vehicle; to remove from the reach of a suspect any weapons or instruments of escape; to prevent the destruction of evidence; and the need for a clear, bright-line rule that informs both the public and law enforcement of the scope of an officer's authority, a search of the passenger compartment of a vehicle and its containers incident to a lawful arrest is reasonable under the Fourth Amendment.

ARGUMENT

I. CONSISTENT WITH THIS COURT'S HOLDING IN *NEW YORK v. BELTON*[3] AND BALANCING THE LIMITED EXPECTATIONS OF PRIVACY IN A VEHICLE AGAINST THE LEGITIMATE NEEDS OF LAW ENFORCEMENT, A SEARCH OF THE PASSENGER COMPARTMENT OF A VEHICLE INCIDENT TO A LAWFUL ARREST IS REASONABLE UNDER THE FOURTH AMENDMENT

"The touchstone of the Fourth Amendment is reasonableness." *United States v. Knights,* 534 U.S. 112, 118

---

3. *Belton,* 453 U.S. 454.

(2001). Whether a search is reasonable under the Fourth Amendment is determined by looking at the totality of the circumstances and assessing the privacy interests intruded upon versus the legitimate needs of the government.

> "[U]nder our general Fourth Amendment approach" we "examin[e] the totality of the circumstances" to determine whether a search is reasonable within the meaning of the Fourth Amendment. [*Knights*] at 118, 122 S.Ct. 587, 151 L.Ed.2d 497 (internal quotation marks omitted.) Whether a search is reasonable "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 118-119, 122 S.Ct. 587, 151 L.Ed.2d 497 (internal quotation marks omitted.)

Samson v. California, 547 U.S. 843, 126 S.Ct. 2193, 2197 (2006); see also *Wyoming v. Houghton*, 526 U.S. 295 (1999).

Balancing the reduced privacy expectations of an arrestee in a vehicle and the physical custody of the arrestee based upon probable cause, versus the legitimate needs of law enforcement including *inter alia*, the need to remove from a suspect's reach any weapons or prevent the destruction of evidence, this Court's holding in *Belton*, 453 U.S. 454 and the search of respondent Gant's vehicle in this matter, are reasonable under the Fourth Amendment.

A. AN ARRESTEE'S EXPECTATION OF PRIVACY MUST YIELD TO LEGITIMATE NEEDS OF LAW ENFORCEMENT

In *Knights*, 534 U.S. 112, this Court phrased the privacy intrusion in terms of one's reasonable expectation of privacy. This Court balanced the "significantly diminished" privacy expectations of a probationer with search conditions

against the legitimate needs of the government to monitor probationers while protecting the public. *Id.* at 119-121. Balancing these circumstances, including the probationer's reduced expectation of privacy, this Court found that no more than reasonable suspicion was needed to search the probationer's residence. *Id.* at 121. This Court further held that these same circumstances

> render[ed] a warrant requirement unnecessary. See *Illinois v. McArthur*, 531 U.S. 326, 330, 148 L.Ed.2d 838, 121 S.Ct. 946 (2001) (noting that general or individual circumstances, including "diminished expectations of privacy," may justify an exception to the warrant requirement.).

Id. at 121-122. Thus, in determining the reasonableness of a search and the necessity of a warrant, one's reasonable expectation of privacy is a salient factor. This salient factor has played no less a role in determining the reasonable scope of a search incident to a lawful arrest.

The highest level of expectation of privacy that one can have is in one's person. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). It is nevertheless well established that a search incident to a lawful arrest of the person is reasonable under the Fourth Amendment.

> The validity of the search of the person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged until the present case.

Robinson, 414 U.S. at 224. This Court went on to hold in *Robinson*:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires

> no additional justification. It is the fact of the lawful arrest which established the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable" search under that Amendment.

Id. at 235. Thus, notwithstanding the high degree of expectation of privacy in one's person, given the legitimate government interest in searching for, and seizing, evidence of a crime; the need to search for weapons and other instruments by which a suspect could injure or kill an officer or make an escape; and the existence of probable cause to believe the suspect has committed an offense culminating in the suspect being deprived of his freedom and taken into physical custody, the search of the arrestee's person after arrest is reasonable.

B. GIVEN THE LESSER EXPECTATION OF PRIVACY IN A VEHICLE, THE SCOPE OF A SEARCH INCIDENT TO A LAWFUL ARREST THAT INCLUDES THE PASSENGER COMPARTMENT OF THE VEHICLE IS REASONABLE UNDER THE FOURTH AMENDMENT

While the authority to search the person of an arrestee incident to a lawful arrest is a straightforward, bright-line rule, the *scope* of the search beyond the arrestee's person has been less than clear. In *Chimel v. California*, 395 U.S. 752 (1969), this Court limited the scope of a search incident to a lawful arrest to a search of the person and the area within his immediate control. *Id.* at 762-763. As observed by this Court in *Thornton v. United States*, 541 U.S. 615 (2004), "[a]lthough easily stated, the *Chimel* principle had proved difficult to apply in specific cases", particularly in the context of vehicle searches.

> [N]o straightforward rule has emerged from the litigated cases respecting the question involved here – the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.

Belton, 453 U.S. at 459. Thus, in *Belton,* this Court sought to establish a clear, bright-line rule that would inform law enforcement and citizens alike what the scope of a vehicle search incident to a lawful arrest encompassed. *Id.* at 459-460. This Court stated:

> [W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

Belton, 453 U.S. at 460-461 (footnotes omitted).

Within the framework of a general Fourth Amendment analysis of reasonableness under the totality of the circumstances, balancing the privacy intrusion against the legitimate needs of the government, this Court's holding in *Belton* establishing the scope of the search of a vehicle incident to a lawful arrest as the passenger compartment and any container therein, is reasonable under the Fourth Amendment. Concomitantly, the Arizona Supreme Court erred in this matter in finding the search of respondent Gant's vehicle to be unreasonable.

1. THE ARRESTEE HAS A REDUCED PRIVACY EXPECTATION IN A VEHICLE AND FROM WHICH HE HAS BEEN ARRESTED BASED UPON PROBABLE CAUSE

It is well established that one has a lesser expectation of privacy in a vehicle than in one's residence and of one's person.

> Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars, which "travel public thoroughfares," *Cardwell v. Lewis*, 417 U.S. 583, 590, 41 L.Ed.2d 325, 94 S.Ct. 2464 (1974), "seldom serve as ... the repository of personal effects," *ibid.* are subjected to police stop and examination to enforce "pervasive" governmental controls "as an everyday occurrence," *South Dakota v. Opperman*, 428 U.S. 364, 368, 49 L.Ed.2d 1000, 96 S.Ct. 3092 (1976), and, finally, are exposed to traffic accidents that may render all their contents open to public scrutiny.

Wyoming v. Houghton, 526 U.S. at 303; see also *California v. Acevedo*, 500 U.S. 565 (1991) at 578 ["From *Carroll* [*v. United States*, 267 U.S. 132 (1925)] through [*United States v.*] *Ross*, [456 U.S. 798 (1982)], this Court has explained that automobile searches differ from other searches."]; *California v. Carney*, 471 U.S. 386 (1985) at 391, ["'the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office' [Citation.]".]

Further, a search incident to a lawful arrest, presupposes sufficient probable cause to make a custodial arrest.

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

Robinson, 414 U.S. at 235. The intrusion upon the suspect's privacy interest in a vehicle upon a public highway from which he has just been arrested is minimal compared to the privacy intrusion of custodial arrest.

//

2. LEGITIMATE GOVERNMENT INTERESTS EXIST FOR THE INTRUSION UPON THE PRIVACY EXPECTATIONS OF AN ARRESTEE

It is well-established that the mobility of a vehicle is an exigent circumstance justifying the search of an automobile without a warrant.

> There are, of course, exceptions to the general rule that a warrant must be secured before a search is undertaken; one is the so-called "automobile exception" at issue in this case. This exception to the warrant requirement was first set forth by the Court 60 years ago in *Carroll v. United States*, 267 U.S. 132 (1925). There, the Court recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of an automobile justifies a lesser degree of protection of those interests.

California v. Carney, 471 U.S. at 390. Thus, the mobility of the vehicle and the need for an on-the-spot search and seizure weighs heavily in favor of the needs of the government.

Searches incident to a lawful arrest, in general, are based on the need of law enforcement

> "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the concealment or destruction of evidence. [Citation.]

Belton, 453 U.S. at 457. It is necessarily a determination that is made quickly and under stressful conditions.

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does

> not require to be broken down in each instance into an analysis of each step in the search.

Robinson, 414 U.S. at 235; see also *Thornton*, 541 U.S. at 621 ["A custodial arrest is fluid and '[t]he danger to the police officer flows from *the fact of the arrest*, and its attendant proximity, stress and uncertainty,' *Robinson, supra*, 414 U.S. at, 234-235...(emphasis added)."]

Lastly, law enforcement as well as the public has a need for clear, straightforward rules that can be easily understood.

> When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.

Belton, 453 U.S. at 459-460; see also *California v. Acevedo*, 500 U.S. at 577 ["We have noted the virtue of providing ' " 'clear and unequivocal' guidelines to the law enforcement profession." ' [Citations.]"]; *Arizona v. Roberson*, 486 U.S. 675 (1988) ["We have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)] as well as *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)]."].

Balancing the reduced privacy expectations that an arrestee has in a vehicle in a public location and who has been taken into physical custody based upon probable cause, versus the legitimate needs of law enforcement to be able to search a very mobile vehicle; to remove from a suspect any weapons or instruments of escape; to prevent the destruction of evidence; and the need for a clear, bright-line rule that informs both the public and law enforcement of the scope of an officer's authority, a search of the passenger compartment of a vehicle and its containers, incident to a lawful arrest is reasonable under the Fourth Amendment. Whether the suspect is handcuffed and placed in a patrol car or is standing

next to the vehicle at the time of the search has no bearing on the determination of reasonableness.

II. AS AN ARRESTEE TAKEN INTO PHYSICAL CUSTODY BASED UPON PROBABLE CAUSE, GANT'S PROXIMITY TO HIS VEHICLE OR HIS HANDCUFFED STATUS ARE IRRELEVANT TO THE ISSUE OF REASONABLENESS UNDER THE FOURTH AMENDMENT

Neither the arrestee's physical proximity to his car nor the presence or absence of handcuffs affects his already diminished expectation of privacy in a vehicle on a public highway. Nor do these factors affect the legitimate needs of law enforcement. The fact that a vehicle *could* be towed and stored does not change the mobility of the vehicle. Any actions other than a contemporaneous search of the vehicle, requires officers to guard the vehicle to prevent an arrestee's friends, family, cohorts or even strangers from tampering with or removing weapons and/or evidence from the vehicle. See *California v. Carney*, 471 U.S. at 393 ["Like the automobile in *Carroll*, respondent's motor home was readily mobile. Absent the prompt search and seizure, it could readily have been moved beyond the reach of the police."].

The proximity of an arrestee to his vehicle, handcuffed or not, does not alter the necessity of law enforcement to look for or retrieve possible weapons or items of evidence that otherwise could be retrieved by passengers, family members, friends or unidentified cohorts, absent a contemporaneous search and seizure. As this Court observed in *Belton*:

> It seems to have been the theory of the Court of Appeals that the search and seizure in the present case could not have been incident to the respondent's arrest, because Trooper Nicot, by the very act of searching the

> respondent's jacket and seizing the contents of its pocket, had gained "exclusive control" of them. 50 N.Y.2d 447, 451, 407 N.E.2d 420, 422. But under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his "exclusive control."

453 U.S. at 462, fn. 5. Further, as this Court observed in *Robinson*:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

414 U.S. at 235. A full search of the person is authorized without further justification for believing that weapons or evidence will be found upon that person. *Id.* The search of a vehicle from which the arrestee has just been arrested, and for which the arrestee has a lesser expectation of privacy than he does in his person, requires no additional justification and is reasonable under the Fourth Amendment. As this Court stated in *Belton*, once a lawful arrest has been made of an individual from a vehicle, an officer may search, incident to that arrest, the passenger compartment of that vehicle and any containers found within. 453 U.S. at 460. The search is reasonable

> since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.

Id. at p. 461.

Lastly, an arrestee's proximity to his vehicle and the presence or absence of handcuffs does not affect the need for law enforcement to have clear and straightforward rules to effectively enforce the law and uncover criminal activity.

> In short, "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." [Citation].

Belton, 453 U.S. at 458.

Under the facts of this case, Gant had a suspended driver's license and an outstanding warrant for driving on a suspended license. Pet. App. A at A-1 to A-2. Because Gant was arrested, handcuffed and placed in the back of a patrol car, *Id.* at A-2, the Arizona Supreme Court held that the scene was secure and that this Court's holding in *Belton,* 453 U.S. 454, did not apply – that is, neither concern for officer safety nor the preservation of evidence justified the search. *Id.* at A-6. This ruling is contrary to this Court's holding in *Robinson,* that a search incident to a lawful arrest does not require a "case-by-case adjudication" and that "[i]t is the fact of the lawful arrest which establishes the authority to search." 414 U.S. at 235.

The Arizona Supreme Court ruling further fails to determine whether under the totality of the circumstances, the search was reasonable under the Fourth Amendment, given Gant's limited privacy expectations in his vehicle, the determination of probable cause to take Gant into physical custody and conduct a full search of his person, and the

legitimate needs of law enforcement. Given law enforcement's clear authority to conduct a full search of Gant's person and Gant's limited expectation of privacy in his vehicle, particularly in light of the fact that he had been driving on a public highway on a suspended driver's license, the search of the passenger compartment of his vehicle was reasonable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Arizona Supreme Court's ruling in this matter.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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STATE OF ARIZONA,

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RODNEY JOSEPH GANT,

Respondent.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus curiae National Association of Police Organizations, Inc., respectfully moves for leave of Court to file the accompanying brief* under Supreme Court Rule 37.2. Counsel for petitioner has consented to the filing of this brief and written consent has been filed with the Clerk of the Court; counsel for respondent has withheld consent.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Police Organizations (NAPO) is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action and education.

Founded in 1978, NAPO is now the strongest unified voice supporting law enforcement officers in the United States. NAPO represents more than 2,000 police unions and associations, 238,000 sworn law enforcement officers, 11,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

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* No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

The decision of the Arizona Supreme Court, holding that officers violate the Fourth Amendment by conducting a vehicle search incident to the lawful custodial arrest of a criminal suspect if they first take the safety precaution of securing the arrested person in a police car, adversely affects the interests of our members by establishing a precedent that compromises safety procedures and eliminates clear and unequivocal guidelines for law enforcement officers on the streets.

For these reasons, *amicus curiae* respectfully requests that the Court grant leave to file this brief.

November, 2007

Respectfully submitted,

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SUMMARY OF ARGUMENT

I. The Arizona Supreme Court has misread this Court's precedents, which allow vehicle searches incident to the lawful, custodial arrest of a recent occupant, without regard to the inability of the arrested person to gain access to the interior of the vehicle.

II. The Arizona Supreme Court's ruling unreasonably forces arresting officers to choose between two risks—jeopardizing their own safety, or jeopardizing the prosecution of the arrested person.

ARGUMENT

I. THE DECISION OF THE ARIZONA SUPREME COURT IS IRRECONCILABLE WITH THIS COURT'S PRECEDENTS.

Basing its ruling exclusively on the Fourth Amendment and this Court's search decisions, the Arizona Supreme Court said that Tucson officers could not search the vehicle recently occupied by respondent after he had been locked in the back of a police car. The court thought that this Court's decisions in *New York v. Belton*, 453 U.S. 454 (1981) and *Thornton v. United States*, 541 U.S. 615 (2004) merely defined the *scope* of a vehicle search incident to arrest, but "[did] not purport to address" the question of whether such searches could even be conducted. *State v. Gant*, 216 Ariz. 1, ¶ 12, 162 P.2d 640, 643 (2007).

These conclusions of the Arizona Supreme Court are at odds with the plain language used by this Court in its decisions: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an

automobile, he *may*, as a contemporaneous incident of that arrest, *search* the passenger compartment of that automobile." *New York v. Belton, supra*, 453 U.S. at 460. (Emphases added.) "So long as the arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers *may search* that vehicle incident to arrest." *Thornton, supra,* at 623-24 [upholding a vehicle search after the arrestee was handcuffed and placed into the back seat of the patrol car, as was respondent]. (Emphasis added.) "*Belton* allows police *to search* the passenger compartment of a vehicle incident to a lawful custodial arrest of both 'occupants' and 'recent occupants'." *Id.*, at 622. (Emphasis added.)

The Arizona Supreme Court also thought that neither *Belton* nor *Thornton* eliminated the need to conduct a case-by-case assessment of the arrestee's access to destructible evidence or weapons, as discussed in *Chimel v. California*, 395 U.S. 752 (1969) [involving the scope of search incident to arrest within a residence]. This conclusion is also inconsistent with this Court's pronouncements regarding the substitution of a general, "workable" rule in all instances of vehicle searches incident to arrest, in place of *Chimel*'s fact-specific inquiry as to the area within the arrestee's immediate control, and the likelihood that evidence or weapons might be found there.

Because "'[A] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific

circumstances they confront'," *New York v. Belton, supra,* 453 U.S. at 458, quoting *Dunaway v. New York,* 442 U.S. 200, 213-14 (1979), this Court generalized that the passenger compartment of the vehicle would be an area inherently within the arrestee's control, and said, "In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization." *New York v. Belton, supra,* 453 U.S. at 460.

> "The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and preserve evidence by searching the entire passenger compartment."

Thornton v. United States, supra, 541 U.S at 623.

The Arizona Supreme Court has misapplied this Court's controlling precedents, returning officers in that State to the pre-*Belton* situation of excessive "second-guessing" and *"post hoc* evaluation of police conduct" *United States v. Sharpe,* 470 U.S. 675, 686 (1985), this Court expressly rejected. "Fourth Amendment rules 'ought to be expressed in terms that are readily applicable by police in the context of the law enforcement activities in which they are necessarily engaged,' and not 'qualified by all sorts of

ifs, ands and buts'." *Atwater v. City of Lago Vista, Texas,* 532 U.S. 318, 347 (2001), quoting *Belton.*

Requiring police officers and reviewing courts to determine, in each individual case, the extent to which the passenger compartment of an arrestee's vehicle was or was not within his physical control is neither practical nor faithful to this Court's rulings.

II. OFFICERS SHOULD NOT BE PUT TO THE GAMBLE OF CONDUCTING VEHICLE SEARCHES INCIDENT TO ARREST WHILE LEAVING POTENTIALLY-DANGEROUS ARRESTEES UNSECURED.

This Court has long recognized the dangerous nature of law enforcement work and the need to allow officers to take reasonable precautions for their safety. *Terry v. Ohio,* 392 U.S. 1 (1968) [weapons frisk of detainee based on reasonable suspicion the person is armed and dangerous]; *Pennsylvania v. Mimms,* 434 U.S. 106 (1977) [ordering driver out at traffic stop because of inherent dangers]; *Maryland v. Wilson,* 519 U.S. 408 (1997) [same for passengers]; *Washington v. Chrisman,* 455 U.S. 1 (1982) [reasonable for officers to monitor the movement of arrested persons]; *Michigan v. Long,* 463 U.S. 1032 (1983) [protective "vehicle frisk" based on perceived dangers]; *Maryland v. Buie,* 494 U.S. 325 (1990) [safety sweep of premises based on articulable suspicion of danger].

The decision of the Arizona Supreme Court means that officers must try to calculate the potential dangerousness of each person arrested at a vehicle stop and decide whether to risk a surprise attack by leaving the arrestee unrestrained while conducting a

search of the vehicle incident to arrest, or whether to reduce the risks to his or her own safety by handcuffing and securing the arrestee in the patrol car, thereby forfeiting the ability to search the vehicle for weapons, contraband or other fruits, instrumentalities or evidence after doing so. Making the wrong calculation in a seemingly-non-threatening case could obviously prove fatal for an unsuspecting officer who was unaware that the arrestee was, for example, an escapee or a fugitive from more serious charges.

As the Court has noted, "Every arrest must be presumed to present a risk of danger to the arresting officer. There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger." *Washington v. Chrisman, supra,* 455 U.S. at 7. The bright line rule of *Belton* and *Thornton* sensibly accommodates the legitimate needs of officers to take steps to restrain arrestees before turning their attention to a search of the interior of a vehicle, a task which generally places officers in a disadvantageous position in case of surprise attack.

Under the paradoxical ruling of the court below, the privacy rights of an arrestee in the passenger compartment of his stopped vehicle could be legitimately infringed if he were standing nearby without restraint; however, this same search would somehow violate his privacy rights under the Fourth Amendment if he were handcuffed and seated in a nearby patrol car. This dichotomy makes the violation or non-violation of the Constitution dependent not on the lawfulness of a contemporaneous custodial arrest,

but solely on the decision of an officer to take, or not to take, standard precautions for his or her personal safety after it has already been determined that an arrest is going to occur.

In order to conduct a vehicle search incident to arrest, law enforcement officers in the State of Arizona are now forced to assume an unnecessary risk of violent confrontation. This is neither a tolerable nor a reasonable requirement. "Certainly, it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry v. Ohio, supra,* 392 U.S. at 23.

Application of the firmly-established exception allowing warrantless searches incident to arrest should not be made to depend on an officer's forbearance of legitimate safety precautions. Yet under the Arizona ruling, officers are put to a choice between "potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction. The Fourth Amendment does not require such a gamble." *Thornton v. United States, supra,* 541 U.S. at 622.

CONCLUSION

The petition for writ of certiorari should be granted and the judgment of the Arizona Supreme Court should be reversed.

November, 2007

Respectfully submitted,

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JOINT APPENDIX

(91)

(7)

No. 07-542

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SUPREME COURT, U.S.

In The Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

vs.

RODNEY JOSEPH GANT,

Respondent.

On Writ Of Certiorari To The Arizona Supreme Court

JOINT APPENDIX

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Certiorari Granted February 25, 2008

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01/06/00	1	DIRECT INDICTMENT [File date 01/06/00]
01/26/00	2	WARRANT FOR ARREST [File date 01/26/00]
01/28/00	3	ORDER RE COURT APPOINTED COUNSEL [File date 01/28/00]
03/30/00	4	MINUTE ENTRY: Pretrial Conference [File date 03/30/00]
04/26/00	5	DEFENDANT'S MOTION TO SUPPRESS [File date 04/26/00]
05/01/00	6	NOTICE: In Chambers [File date 05/01/00]
05/18/00	7	RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS [File date 05/18/00]
05/22/00	8	MINUTE ENTRY: Hearing Re: Motion to Suppress [File date 05/22/00]
06/05/00	9	MINUTE ENTRY: In Chambers Ruling on Motion to Suppress [File date 06/05/00]
09/14/00	10	MINUTE ENTRY: Jury Trial – Third and Final Day [File date 09/14/00]
09/14/00	11	VERDICT [File date 09/14/00]
09/14/00	12	VERDICT [File date 09/14/00]

09/14/00 13 SENTENCE NOTIFICATION FORM [File date 09/14/00]

10/13/00 14 SENTENCE OF IMPRISONMENT [File date 10/13/00]

10/13/00 15 COMMITMENT ORDER [File date 10/13/00]

10/18/00 16 NOTICE OF APPEAL from the Superior Court [File date 10/18/00]

Arizona Court of Appeals

02/21/01 17 APPELLANT'S OPENING BRIEF [File date 02/21/01]

05/07/01 18 APPELLEE'S ANSWERING BRIEF [File date 05/07/01]

06/04/01 19 APPELLANT'S REPLY BRIEF [File date 06/04/01]

01/24/02 20 ORDER setting oral argument for February 26, 2002 [File date 01/24/02]

03/29/02 21 COURT OF APPEALS' OPINION [File date 03/29/02]

04/24/02 22 STATE'S PETITION FOR REVIEW by the Arizona Supreme Court [File date 04/24/02]

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09/26/02 23 ARIZONA SUPREME COURT ORDER denying Review [File date 09/26/02]

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10/23/02 24 MANDATE [File date 10/23/02]

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04/21/03 26 NOTICE OF UNITED STATES SUPREME COURT grant of certiorari [File date 04/21/03]

Arizona Court of Appeals

01/28/05 27 FIRST NOTICE OF APPEAL [File date 01/28/05]

02/15/05 28 ORDER Thomas Jacobs relieved from further responsibility for the Appellant. FURTHER ORDERED Jack Lansdale is appointed to represent Appellant [File date 02/15/05]

02/25/05 29 Appellant's Request to Vacate Order Relieving Counsel [File date 02/25/05]

03/03/05	30	ORDER Appellant's Request to Vacate Order Relieving Counsel is DENIED [File date 03/03/05]
03/08/05	31	ORDER this court's order dated 3/3/05 is VACATED. FURTHER ORDERED Jack Lansdale is relieved from further responsibility for the Appellant. FURTHER ORDERED Thomas Jacobs is appointed to represent Appellant [File date 03/08/05]
03/21/05	32	ORDER the court reporters shall prepare and file the required transcripts in this court on or before May 5, 2005 [File date 03/21/05]
05/19/05	33	ORDER court reporter is granted an extension of time, to and including, May 31, 2005, to file the required transcript(s) [File date 05/19/05]
05/31/05	34	NOTICE record complete [File date 05/31/05]
08/02/05	35	ORDER granting Appellant an extension for filing an Opening Brief to and including 08/08/05 [File date 08/02/05]
08/04/05	36	FILED Return Receipt by Thomas Jacobs [File date 08/04/05]
08/08/05	37	ORDER Opening Brief not having been filed, counsel for Appellant shall be fined $100 per day beginning on 8/9/05. FURTHER ORDERED Appellant's Opening Brief and fine shall be filed by 5 p.m. on 8/15/05 [File date 08/08/05]

08/10/05 38 FILED Return Receipt by Thomas Jacobs [File date 08/10/05]

08/30/05 39 Appellate Contract pay Claim approved 8/30/05 [File date 08/30/05]

08/31/05 40 FILED Motion to Strike Opening Brief and Dismiss Appeal by Thomas Jacobs [File date 08/31/05]

09/07/05 41 ORDER Opening Brief filed 8/9/05, is STRICKEN. FURTHER ORDERED the Motion to Dismiss Appeal is GRANTED. FURTHER ORDERED appeal is DISMISSED. FURTHER ORDERED this court's mandate issued on 10/23/02 in 2 CA-CR 2000-0430 is VACATED. FURTHER ORDERED all the documents in 2 CA-CR 2005-0037 shall be considered as part of the file in 2 CA-CR 2000-0430. FURTHER ORDERED Appellant's Opening Brief in 2 CA-CR 2000-0430 shall be due on or before 10/07/05 [File date 09/07/05]

10/19/05 42 MANDATE ISSUED [File date 10/19/05]

Arizona Supreme Court

10/19/06 43 FILED State of Arizona's Petition for Review by the Supreme Court (Appellee) [File date 10/19/06]

10/19/06 44 RECEIVED record from Court of Appeals [File date 10/19/06]

11/09/06 45 FILED Motion to File Amicus Petition for Review (Arizona Law Enforcement Legal Advisors' Association and Arizona Association of Chiefs of Police (brief rec'd) [File date 11/09/06]

11/22/06 46 FILED Appellant's Response to Petition for Review (Gant) [File date 11/22/06]

12/19/06 47 FILED Arizona Law Enforcement Legal Advisors' Association and Arizona Association of Chiefs of Police Amicus Petition for Review by the Supreme Court (Amicus Brief in Support of the Petition for Review) [File date 12/19/06]

12/19/06 48 ORDER Motion to File Amicus Petition for Review by the Supreme Court shall be treated as a Motion for Leave to File an Amicus Brief in Support of the Petition for Review and, as such, is granted. FURTHER ORDERED if petition for review is granted, any additional brief amici may wish to file must be preceded by prior leave of the court [File date 12/19/06]

01/03/07 49 RECEIVED envelope addressed to Gant returned marked "Inmate No Longer in Custody." [File date 01/03/07]

02/08/07 50 ORDER State of Arizona's Petition for Review by the Supreme Court = GRANTED. FURTHER ORDERED case shall be set for oral argument. FURTHER ORDERED parties may file simultaneous supplemental briefs [File date 02/08/07]

02/13/07 51 NOTICE OF ORAL ARGUMENT set for March 20, 2007 [File date 02/13/07]

02/15/07 52 RECEIVED remaining record from Court of Appeals [File date 02/15/07]

03/08/07 53 FILED Respondent Gant's Supplemental Brief on the Merits [File date 03/08/07]

03/12/07 54 FILED Motion to File Amicus Curiae Brief (the Arizona Law Enforcement Legal Advisors' Association and Arizona Association of Chiefs of Police) (brief rec'd) [File date 03/12/07]

03/12/07 55 FILED Appellee's Supplemental Brief [File date 03/12/07]

03/13/07 56 ORDER granting the "Motion to File Amicus Curiae Brief" [File date 03/13/07]

03/13/07 57 FILED Arizona Law Enforcement Legal Advisors' Association and Arizona Association of Chiefs of Police Amicus Brief [File date 03/13/07]

03/16/07 58 FILED Motion for Leave to File an Amicus Curiae Brief on Behalf of the City of Tucson (brief rec'd) [File date 03/16/07]

03/20/07	59	ORAL ARGUMENT
03/29/07	60	ORDER granting Motion to Leave to File Amicus Curiae Brief. [File date 03/29/07]
03/29/07	61	FILED Brief of Amicus Curiae, the City of Tucson [File date 03/29/07]
07/25/07	62	OPINION reverse judgment of the superior court and affirm judgment of the court of appeals suppressing the evidence, but vacate the opinion of the court of appeals [File date 07/25/07]
07/25/07	63	FILED Motion to Stay Issuance of Mandate (Appellee State) [File date 07/25/07]
07/26/07	64	ORDER granting Appellee's Motion to Stay Issuance of Mandate [File date 07/26/07]
10/19/07	65	FILED Notice of Filing Petition for Writ of Certiorari; REQUEST to Continue Stay (Appellee State) [File date 10/19/07]
10/22/07	66	ORDER continuing the issuance of the stay of the mandate [File date 10/22/07]
10/19/07	67	FILED Notice from United States Supreme Court – Petition for Writ of Certiorari [File date 10/19/07]

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, vs. RODNEY JOSEPH GANT, Defendant.	No. CR-2000-0042 DEFENDANT'S MOTION TO SUPPRESS (Filed Apr. 26, 2000) (Evidentiary hearing required) Hon. Clark Munger, Div. 19

Defendant, Rodney Gant, pursuant to Rules 16.2 moves the Court to suppress the fruit of the search of Mr. Gant's vehicle conducted after his arrest in connection with this case. The search was without probable cause or reasonable suspicion, and was not properly incident to Mr. Gant's arrest. This motion is

supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Rodney Gant was arrested on August 25, 1999, by Tucson Police Officers who believed that he was driving on a suspended license. After his arrest, his vehicle was searched. The search turned up a handgun and a substance believed to be cocaine secreted in a jacket.

In his report, Officer Griffith of the Tucson Police Department set out the circumstances of the arrest. When Mr. Gant drove up, officers were at that location, in the process of arresting a Mr. White on several outstanding warrants. The relevant portions of Officer Griffith's narrative continue at that point:

"As this was happening a white car pulled up that I recognized from the house from our previous contact. The car pulled into the driveway of the house and I shined my flashlight into the drivers area of the car and saw the subject we had previous contact with. That subject was Rodney Gant 120172. When I had run Mr. Gant on the computer earlier it showed he had a suspended drivers license & an outstanding warrant for FTA from Pima County Sheriff Dept.

"I walked to Mr. Gant's vehicle as he was walking from the vehicle. I called for Mr. Gant by name and he answered. I took Mr. Gant into custody and placed him & handcuffs. Mr. Gant asked why he was being

arrested and I told him for driving on a suspended license. He voluntarily said he knew his license was suspended, but he just had to run to the store. He also said he did have a warrant for driving on a suspended license that he needed to take care of. Mr. Gant was placed in the back of Ofc. Griffin's patrol car.

"Ofc. Nolan #38874 & Ofc. Reed #31440 did a search of Mr. Gant's vehicle incident to arrest."

This report reveals that, at the time of the search, Mr. Gant was out of his vehicle, had been handcuffed, and had been placed in the back of a patrol car. Indeed, the first contact with Mr. Gant occurred while Mr. Gant was walking away from his vehicle. Such a search, therefore is not incident to the arrest.

The seminal case dealing with a search incident to arrest is *Chimel v. California,* 395 U.S. 752, 762-63 (1969), which established the rule that a warrant is not necessary to conduct a search of the person and the area from which an arrest might gain possession of a weapon or destructible evidence so long as it occurs relatively contemporaneously to the arrest. Although a warrantless search of Mr. Gant's vehicle would have been justified if justified by probable cause to believe that evidence of a crime or contraband was present (U.S. v. Ross, 456 U.S. 798, 804-09 (1982)), because Mr. Gant was arrested for driving on a suspended license, there was no reason to suspect that evidence of a crime or contraband would be

gained in a search. The only justification for the search, then, is to look for a weapon.

The particular rule with respect to the search of vehicles for weapons was set out in *New York v Belton,* 453 U.S. 454 (1981). As to that rule, it has been observed "[t]hat *Belton* unmistakably forecloses all . . . *post facto* inquiries of actual 'reachability' . . . the only question a trial court asks is whether the area searched is generally 'reachable *without exiting the vehicle,* without regard to the likelihood in the particular case that such a reaching was possible." *U.S. v. Doward,* 41 F.3d 789 (1st Cir. 1994) (quoting 3 Wayne R. Lafave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.1(c) at 16-17 (2d ed. 1987)) (emphasis in original).

In this case, because Mr. Gant had already exited the vehicle and was walking away from it when first contact was made, and he was handcuffed and secured in the back of a patrol car when the search was conducted, the area searched was in no way reachable by Mr. Gant.

Finally, even if the search for weapons was proper, the seizure of the alleged cocaine was not. In his report, Officer Nolan described the sequence leading up to the seizure of the suspected contraband.

"During my search, I observed a large blue/yellow jacked [sic] on the rear seat. I squeezed the left pocket and felt a substance that crumbled in my hand. Inside the pocked I located a plastic baggy containing a white powdery substance consistent of powder cocaine."

After feeling a substance that crumbled in his hand, officer Nolan obviously knew that he had not located a weapon. Nevertheless, he continued the search without justification and without a warrant while Mr. Gant sat some distance away secured by other officers.

Obviously the state must assert that it did not need a warrant to search Mr. Gant's vehicle; not only because no warrant was obtained, but because no warrant could have been obtained. The only evidence that could have been presented was that Mr. Gant had been arrested for driving on a suspended license. and on a warrant for failure to appear on a charge of driving on a suspended license. Had the officers requested a warrant to search for drugs or weapons, no magistrate would have granted it. The need to be able to conduct a warrantless search of vehicles is based on the fact that cars are movable, and evidence may be lost while the officers are attempting to obtain a warrant *California v. Acevedo,* 500 U.S. 565 (1991). That does not mean, however, that a vehicle can be searched without cause. They can be searched to look for contraband where there is reason to believe that contraband is present; and they can be searched where there is a risk that an occupant might reach a hidden weapon. Neither exception to the warrant requirement was present here. Accordingly, the fruits of the search of Mr. Gant's vehicle must be suppressed for the reason that the search was conducted in violation – of Defendant's rights under the Fourth, Fifth, and Fourteenth Amendments of the

United States Constitution and the corresponding provisions of the Arizona Constitution

RESPECTFULLY SUBMITTED this 26th day of April, 2000

/s/ Philip Kimble
Philip Kimble
Attorney for Defendant

Copy of the foregoing hand-delivered
this 26th day of April, 2000 to:

Hon. Clark Munger
Pima County Superior Court

and faxed to:

Mark Diebolt
Pima County Attorney's Office
622-1203

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, vs. RODNEY JOSEPH GANT, Defendant.	No. CR-20000042 **RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS** (Filed May 18, 2000) Hon. Clark Munger, Division 19

COMES NOW the State of Arizona, by and through the Pima County Attorney, BARBARA LAWALL, and her Deputy, MARK DIEBOLT, and hereby responds to the Defendant's Motion to Suppress in the accompanying Memorandum of Points and Authorities.

Respectfully submitted this 16 day of May, 2000.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

/s/ Mark Diebolt
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Deputy County Attorney
State Bar No. 017202
Pima County Attorney's Office
Law Firm No. 69000

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On August 25, 1999, Officer Griffith responded to 2524 N. Walnut in response to a report of possible narcotic activity. Defendant, RODNEY JOSEPH GANT, answered the door. Defendant told the Officer that the resident would be home later in the evening. After running Defendant's name through a computer, the Officer discovered that Defendant had suspended drivers license and an outstanding warrant.

Later that day, the Officer returned to the house in an attempt to make contact with the resident. When the Officer arrived at the house, a man sitting in the back yard, who identified himself as Ben White, said that he was waiting for a friend. The Officer later learned that the man's real name was Jackie White. Ben/Jackie informed the Officer that he was dropped off by a female sitting in a vehicle parked in front of the house. Subsequently, the Officer made contact with the female. The female said that she was waiting for a man named "Jack" who was at the house in question. The female voluntarily agreed to let the Officer search the car. Inside a purse on the floor of the driver's seat, the Officer found a crack pipe containing residue.

Subsequently, Defendant arrived at the house driving a vehicle. As Defendant was walking away from his vehicle, he was arrested by the Officer. The Officer discovered $319 in Defendant's pocket. Officer

Reed discovered a handgun in the vehicle. Officer Nolan found a jacket on the rear seat and squeezed the left pocket. Inside the pocket, this Officer felt a substance that crumbled in his hand. When he removed the substance, Officer Nolan discovered cocaine in a bag. Defendant now seeks to suppress all evidence obtained by searching his vehicle. His motion must fail for the reasons set forth below.

LAW AND ARGUMENT:

I. THE OFFICERS HAD PROBABLE CAUSE TO SEARCH THE DEFENDANT'S VEHICLE FOR CONTRABAND.

Because of the inherent mobility of automobiles, and because of the fact that there is a lesser expectation of privacy than in houses, police may search a car without a warrant, but must have probable cause to believe it contains contraband or evidence of a crime. *State v. Walker,* 119 Ariz. 121, 127, 579 P.2d 1091, 1097 (1978). Further, if an officer has probable cause to search a vehicle, he may search the whole car and any containers therein. *U.S. v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). Since a car is "readily mobile," it can be searched once the officers have probable cause, and there does not need to be any showing of additional exigency. *Pennsylvania v. Labron & Kilgore,* 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996).

In the case at bar, the Officers had probable cause to search the vehicle. Defendant was present at a house suspected of narcotic activity. Before Defendant returned to the residence in his car, the Officers discovered a man in the backyard who lied about his name. A woman with a crack pipe containing residue was waiting for the man in front of the house. These facts, when viewed together, gave the Officers reason to believe that the house is used for selling drugs. To use a house for selling drugs, one must transport drugs or drug making materials to the house. Because Officers reasonably believed that people were waiting at the house to purchase illegal drugs, they had reason to believe that anyone arriving at the scene was transporting drugs. This conclusion is made more probable by the lage [sic] amount of cash discovered on Defendant's person. Consequently, the Officers had probable cause to search the inside of the vehicle where they discovered a weapon and cocaine.

II. THE OFFICER'S SEARCH OF DEFENDANT'S VEHICLE WAS VALID AS IT WAS INCIDENT TO A LAWFUL ARREST.

A law enforcement officer may search a vehicle after lawfully arresting an occupant of that vehicle. *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). While the reason at the time of *Belton* for allowing the search incident to arrest was "to ensure the safety of the officer and protect evidence from being intentionally destroyed," *State v. Hanna,* 173 Ariz, 30, 32, 839 P.2d 450, 452 (App.

1992), the *Belton* decision allows searches even when there is little likelihood of an officer being endangered or evidence being destroyed. Such searches are justified by the inherent mobility of cars.

The Court in *United States v. Doward* wrote, "*Belton* upheld a warrantless search of the entire 'passenger compartment' against a claim that all its occupants were outside the vehicle at the time of the search – thus, as a practical matter, no longer within 'reach' of any weapons, evidence or contraband located within the passenger compartment." 41 F.3d 789 (1st Cir. 1994). In other words, an officer may search the inside of a vehicle when arresting the occupant even if the occupant exits the vehicle prior to the search.

In the case at bar, like in *Belton,* the defendant was arrested for a crime committed inside of a vehicle which was discovered by the officer while the perpetrators were located inside the vehicle. Also like in *Belton,* the evidence in question was discovered inside the passenger compartment. Consequently, under *Belton,* the search in the case at bar was legally performed incident to Defendant's arrest.

For the foregoing reasons the State respectfully requests that this Court deny the Defendant's Motion to Suppress the Evidence.

Respectfully submitted this 6 day of May, 2000.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

/s/ Mark Diebolt
MARK DIEBOLT
Deputy County Attorney
State Bar No. 017202
Pima County Attorney's Office
Law Firm No. 69000

Copy mailed/delivered this
18 day of May, 2000, to:

Philip Kimble
5639 East Fifth Street, Suite G
Tucson, Arizona 85711
Attorney for Defendant

Hon. Clark Munger
Division 19

/jdm

ARIZONA SUPERIOR COURT, PIMA COUNTY	CASE NO. **CR-20000042**
	DATE: May 22, 2000
JUDGE: HON. CLARK MUNGER	
COURT REPORTER: Cheryl Austin	
STATE OF ARIZONA	Mark Diebolt
VS.	
RODNEY GANT	Philip Kimble

MINUTE ENTRY

HEARING RE MOTION TO SUPPRESS:

Defendant present in custody.

Court and counsel briefly discuss the facts in this case.

Mr. Kimble and Mr. Diebolt present oral argument to the Court.

For reasons stated by the Court on the record, the Court believes at this time that the Court will deny the Motion to Suppress after counsel present further memoranda to support their positions.

cc: Hon. Clark Munger
Criminal Calendaring
County Attorney – M. Diebolt
Sheriff
Philip Kimble, Esq.

/s/ Mary Bailey
Deputy Clerk

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,	) Case No. CR-20000042
Plaintiff,	) 2 CA-CR 00-0430
vs.	)
RODNEY JOSEPH GANT,	)
Defendant.	)

Monday, May 22, 2000
Tucson, Arizona

OFFICIAL COURT REPORTER'S TRANSCRIPT

MOTION TO SUPPRESS

BEFORE: THE HONORABLE
CLARK W. MUNGER, JUDGE

APPEARANCES:

For the State:

MARK DIEBOLT, Esq.
Deputy County Attorney

For the Defendant:

PHILIP KIMBLE, Esq.
Attorney at Law

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[3] PROCEEDINGS

THE COURT: State vs. Grant – Gant, pardon me, CR-20000042.

MR. DIEBOLT: Your Honor, Mark Diebolt appearing on behalf of the State.

MR. KIMBLE: Good afternoon, your Honor, Philip Kimble for Mr. Gant, present, in custody. Your Honor.

May my client sit at counsel table with me?

THE DEPUTY: Yeah.

THE COURT: Yes.

This is defense motion to suppress. I have read the respective briefs. It doesn't sound as though we have any 9th Circuit or Arizona case that's just exactly right on point, here.

Is that counsel's belief also?

MR. DIEBOLT: Can I have just one second, Judge?

MR. KIMBLE: Your Honor, the defense is not aware of a controlling Arizona 9th Circuit case that we would consider directly on point.

THE COURT: Okay.

MR. DIEBOLT: And, your Honor, the only 9th Circuit case is *State vs. McLaughlin.* – *State* [4] *vs. McLaughlin,* 175 F.3d 889, just talking about automobile search commencing five minutes after the defendant has been arrested or removed from the scene.

THE COURT: All right.

MR. DIEBOLT: They agree that the search in that case occurred during a continuous series of events closely connected in time to the event so, therefore, it was a valid search.

THE COURT: Are any of the facts in issue? It seemed to me that from your respective briefs, that there didn't seem to be any disagreement. As I understand the facts – and let me repeat what I understand they are: That this arose out of a report of possible narcotic activity: police went to the – police went to the residence, knocked on the door. The defendant answered, but told them apparently that he was not –

Are these potential witnesses?

MR. DIEBOLT: They are, your Honor. Both police officers.

THE COURT: Maybe it would be appropriate that they are not here while I reiterate what I understand the facts to be.

MR. DIEBOLT: That's fine. Okay. The [5] only reason I'm keeping them, if they want to clarify the Court the different –

THE COURT: Well, I'll leave that up to the two of you to clarify by testimony. Okay?

MR. DIEBOLT: Okay.

THE COURT: That they ran a computer check on Rodney Joseph Gant and found that he was wanted on a suspended driver's license and, also, an outstanding warrant for failure to appear.

MR. DIEBOLT: Yes, sir.

THE COURT: They came back – they left and then came back to the residence, found a man and a woman around the residence. The woman had a crack pipe. The man, they didn't apparently find any contraband on him. Then the defendant arrived, driving a vehicle, and the officer, as the car pulled into the driveway, shined his flashlight into the car, recognized Mr. Gant as the individual he had previously met at the door and identified him as Mr. Gant.

And as the officer was walking toward the vehicle, Mr. Gant got out of the vehicle and started walking toward the officer when the officer called him by name, and he responded that that was who he was. And the officer took him in custody for the [6] outstanding

warrant and suspended driver's license, having seen him operating a motor vehicle. So he – there's no question that he could legally arrest and did lawfully arrest the defendant on the outstanding warrant and for operating a motor vehicle without a driver's license.

Mr. Gant was removed from the vehicle – from the vicinity of the vehicle to the officer's patrol car and placed in the back of the patrol car, and the officers then did a search of the defendant's vehicle, found a weapon and found the jacket. And, apparently, feeling the jacket, felt something that they felt might be drugs and took it out of the pocket and found cocaine.

Is there any disagreement with –

MR. KIMBLE: I believe – again, not yet having interviewed the officers and relying on their reports, those are the facts that I recited in my motion.

THE COURT: Okay.

MR. KIMBLE: And I believe those – those are consistent. I'm not aware that the State has any disagreement with any of those. And I am willing to base my motion on those assertions of facts in the reports.

[7] THE COURT: Okay. Mr. Diebolt, do you have anything – any disagreement with the version of the facts?

MR. DIEBOLT: I have no disagreement, Judge.

THE COURT: All right. Do we need the officers, then, for testimony?

If you want to, that's fine.

MR. KIMBLE: I do not. If –

MR. DIEBOLT: I just subpoenaed them in case we had to have them. I didn't want to get caught without having witnesses.

MR. KIMBLE: Sure. I think I would be entitled, if there was some issue about the facts.

THE COURT: Absolutely. If you want them.

MR. KIMBLE: But if the State concedes those are the facts, I think those are facts sufficient to proceed on the motion.

THE COURT: All right.

MR. DIEBOLT: I have no disagreement with the facts. I'd be happy to submit, also, on my pleading as well.

THE COURT: All right. Okay. Then I think we can tell the officers –wait for Mr. Gant to talk with his attorney.

[8] (Attorney-client discussion.)

MR. KIMBLE: I'm sorry, your Honor.

THE COURT: If there's no need for testimony, we can tell the officers they're free to go.

MR. KIMBLE: I have no objection.

MR. DIEBOLT: May I ask just ask, procedurally, where we're going to go at this point? I'm just curious as to –

THE COURT: Well, I'd like to hear oral argument from you.

MR. DIEBOLT: Okay. Is there any – since they are here –

THE COURT: Well, we'll have them wait. That's fine.

MR. DIEBOLT: Just for the period of time it's going to take to resolve it.

THE COURT: All right.

MR. KIMBLE: Your Honor.

THE COURT: Yes, sir.

MR. KIMBLE: May I inquire of counsel if the case cited is one cited in your response?

MR. DIEBOLT: The *McLaughlin* case?

MR. KIMBLE: Yes.

MR. DIEBOLT: I was looking. I don't [9] believe it's in my response.

MR. KIMBLE: If the Court would like it – sounds like it might be more on point than anything I found. If the Court would like any further argument on that after this, I'd be happy to review it and provide supplemental.

THE COURT: If you want to take a look – is it *McLaughlin, McLaughlin.*

MR. DIEBOLT: *U.S. vs. McLaughlin.*

THE COURT: Do you want to review that and submit a Reply and submit it on –

MR. KIMBLE: I might if the Court would permit. I just don't know.

THE COURT: Certainly.

MR. KIMBLE: Whether the facts are distinguishable or if they're helpful or whatnot. I haven't read the case yet myself.

MR. DIEBOLT: And, your Honor, I only just found that looking through a different source that I don't – I had to get a copy from my supervisor.

THE COURT: And what – again, what's the cite?

MR. DIEBOLT: It's *U.S. vs. McLaughlin,* M-c-L-a-u-g-h-l-i-n, 170 F.3d 889, 891, pages, 9th Circuit, 1999.

[10] THE COURT: Okay. I will take a look at that.

MR. KIMBLE: Your Honor, the justification of the search in this case is always incident to an arrest. And certainly that's the only reason it could have been justified because there was no warrant, there's no reasonable suspicion.

THE COURT: I don't think they had probable cause to arrest on a drug charge, and I think that was the thrust of your argument. And the State has argued that, well, they didn't have probable cause to arrest on a drug. I don't think they did.

MR. KIMBLE: You know, and I don't even see any – they did not even claim that they were arresting on that basis. They were claiming they were arresting because they saw him driving. And that, apparently, would be a misdemeanor occurring within the vision of an arresting officer.

Now, interestingly – I have to question whether or not there was a pretextual reason for the arrest, because they had justification for an arrest previously based on the fact that they were aware when they were there previously that Mr. Gant had – had an outstanding warrant, not having seen him [11] driving. And whether it's out of the goodness of their hearts that they did not arrest him at that time or they were seeking some further pretext, I don't know. And I don't know whether or not even testimony on that point would be salient to a decision by the Court, because what think I think is important is what happened when Mr. Gant was arrested, is he pulled up, at some point they determined that it was him

driving. Either as he was driving up or when he got out or at some point they determined it was him. Based on the previous contact, they were aware he was not supposed to be driving and he was. The contact they had with him is outside the vehicle. The vehicle was not in a place where it was obstructing traffic. He was parked at a private residence.

This is an arrest for a misdemeanor, and, presumably, additionally on failure to appear, which I believe either – I do not believe there was an indication of what the failure to appear was. Obviously, it's reasonable to assume it was for a misdemeanor since they did not arrest him previously. And my supposition is that it was for a driving-on-a-suspended, although I don't know if that is even in the reports, and it's not even clear [12] whether or not the officers were aware that they were – the nature of the failure to appear. In any case, they were arresting him on a misdemeanor when he is away from the vehicle, where there was no need to secure the vehicle, when the vehicle is locked.

Now, a search incident to arrest is necessary to prevent the loss of evidence or contraband, where there is reason to believe that the person would be a suspect. An arrest for driving on a suspended license has no inference or cause to believe that there would be drugs, instrumentalities of criminal activity, contraband, or anything of evidentiary value in the vehicle that the defendant left; therefore, the only real justification is search for weapons.

There, you get in a couple of problems. One, sure, they can search him and they can search an area within his control for weapons. They can even probably search areas in a car that are not readily immediately accessible to him if it's incident to the arrest. But at the time the vehicle was searched, Mr. Gant was under arrest. He was removed from the area, he was secured in the back seat of a patrol car, and he was not even initially contacted until he was away from the vehicle. So he [13] had no more connection to anything – any weapon that might be in that vehicle than any other person walking by, because he had no access to that vehicle at the time it was searched.

Second problem is the officers searched this jacket they find in the back of a car. Now, they feel something that they – the officer that searches feels something that they perceive could be a weapon, and it turns out to be a gun. The officers say they feel something else – he feels something else crumbling.

Now, if what we're talking about is a legitimate search for contraband, there would be an argument that one would expect something, cocaine or some other illegal substance to be crumbly, like that, on supposition that probably people aren't carrying flour in their pockets. But it is not searched for that purpose because there's no reason to suspect that there were drugs involved in this arrest since it was an arrest for driving on a suspended license.

If it can only be justified a search for officer safety reasons, when they feel something crumbly,

now it's not a weapon and the search can go no further. They continue to search either on the [14] justification or the belief they have a legitimate right to search for drugs and find the contraband that, then, become the basis of the charge here.

Mr. Gant did not have access to it, so it was not a legitimate search for weapon. Even if it was a legitimate search for a weapon, they knew it wasn't a weapon as soon as they felt it, yet continued with the search.

Therefore, for both of those reasons, it's an improper search not incident to his arrest for misdemeanor driving on a suspended license.

MR. DIEBOLT: Thank you, your Honor.

First of all, as everyone is aware, and I want to just reiterate that, automobiles have a lesser expectation of privacy than a home. Obviously, they're treated differently. I want to jump ahead under case law, your Honor, *New York vs. Belton,* when a policeman has made a lawful custodial arrest, that police officer, contemporaneously to that that arrest, may search the passenger compartment of that automobile. It doesn't say he has to search for any particular item. He may – he or she may search the compartment of the car and any containers therein, and he may open those containers and look into those containers.

[15] So let's just talk about the jacket. That's what we're going toward is the jacket.

I want to bring out in *State vs. Milton – United States vs. Milton,* the Supreme Court held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he, contemporaneous to that arrest, may search the passenger compartment of the automobile. Under *Belton* the police may also examine the contents of any containers found within the passenger compartment. "Container" as defined in *Belton,* you know, include the glove compartment, et cetera. *Belton* applies even if the arrestee has been separated from the vehicle prior to the search of the – of the compartment that they're talking about.

Jumping ahead to State – *U.S. vs. Woody,* W-o-d – W-o-o-d-y, the Supreme Court has articulated two reasons which justified the warrantless search of an automobile: first, to uncover weapons, in this case a weapon was uncovered; two, to prevent the disappearance or destruction of evidence of a crime. Certainly, if those officers had not found that – I believe my information is 13.6 grams of powder cocaine, that [16] evidence could have easily been destroyed, taken away, or removed from that vehicle. Thus, an arrest of the occupant of the car justifies an automobile search of the car's passenger compartment, regardless of whether the officer's [sic] effecting the arrest reasonably believe the arrestee to be rust [sic] or within reach of a weapon. And that is *State vs. Woody.*

I can give the cite if you want. Police thus have a right to search the car's passenger compartment, including open and closed containers, irrespective of any privacy interests the car's occupants might have

to their belongings. And I would certainly submit to the Court that a coat or jacket, in this case, would fall within closed container description.

The last one I want to bring to the Court's attention is defense counsel mentioned that he was away from the car. *McLaughlin* addresses that, and I just mentioned *McLaughlin* today, and it wasn't mentioned in my cites. If defense needs more time, I respect that. But *McLaughlin,* again, talks about the *Belton* bright line rule, that they may search a compartment. And they agree that it doesn't have to be done at the exact second. A [17] person can be removed, placed away, placed under arrest, and the officer can then go back and search the car and – although other search privileges, if you will, that the officer has are still valid.

And based on all that case law, I would submit everything else to the Court on the pleadings.

MR. KIMBLE: Part of the problem here is that Mr. Gant, when he was arrested, was away from the car. This is not a situation where the police pull someone over, effect an arrest, essentially, of the person in the car, remove them from the car, and then search it. He was as removed from the – from that car as I am from my truck, which is parked in the parking lot.

Now, I don't think anybody would argue that if the deputy arrested me here, that there would be justification to go search my truck. I am removed from it. And Mr. Gant was removed from his car

before the first contact was made with the officers. He's walking away, as it says in the report, and they come up to him. So they are making an arrest of him, essentially, out in public, not in the vehicle.

And it's being realistic – it's clear why [18] the officers have to say they're making this search incident to the arrest. One, they could have gotten a warrant or they could have tried to get a warrant, and it's because, obviously, they were watching the premises. They were back there twice. So it's not as if they're making a stop on the highway, and if they don't search now they don't have an opportunity to search. If they thought they could get a warrant, they could call a judge or a magistrate, get a warrant while they're sitting there waiting.

It's clear why they didn't do that, because no judge or magistrate would give them a warrant. If they said, We saw this person driving up to his house, we think that some illegal activity might be going on and we arrested him for driving on a suspended license, would you then give us a warrant to search his car for drugs or weapons?, a judge is going to say no. There is no reason to suspect that somebody driving on a suspended license up to a house – up to a house, not away from the house, even where you suspect illegal activity is going on, would have drugs or weapons.

So they have to say it's incident to an arrest to get around the warrant requirement. The problem is the exigency really goes to whether or [19] not he

needed the warrant, not whether or not you should be able to search. Here Mr. Gant was separated from the car before the contact occurred. They had no reason to search for drugs, even if they had reasons to search for weapons. He was away from it by the time they had contact with him. And when they found something, they knew it wasn't a weapon, they continue to search, and that's not what's permissible. Thank you.

THE COURT: I think I need to deny the motion for two bases – two reasons: One, the officers clearly saw Mr. Gant operating a motor vehicle when they knew he didn't have a license, so they saw him committing a crime; Mr. Gant got out of the vehicle. Had they walked – had the officers walked a little faster and gotten to the vehicle before Mr. Gant got out, I don't think there's any question they could search anywhere in that vehicle. He's in the vehicle. Anything within the passenger compartment, locked or unlocked, can be searched for weapons, drugs, anything.

The fact that Mr. Gant was fast enough and clever enough to get out of the vehicle I don't think limits the officer's ability to search the vehicle when they were arresting him for an illegal [20] operation of the vehicle. They saw him operating it against the law. They clearly had the ability to search for weapons even if – and I think that's so even if he was outside the vehicle. Once they found the weapon, I think then they had probable cause to search further.

And I think they could have gotten a warrant at that point based on the facts as the officers knew them to be once they found the weapon in the vehicle. They could, at that point, have called a judge and have gotten a search warrant to search for illegal contraband, given the fact that they found somebody waiting at the residence who had a crack pipe. They had another individual sitting in the back yard for no apparent reason. They apparently had some information that there was narcotic activity going on at the house. And also given the fact Mr. Gant had told them that the resident was out and would be coming back later, which would appear to have been a lie to the officers, they may have – I don't know whether he was trying to mislead them or what, but I think under – I don't think he can limit the scope of the search by vacating the car faster than the officers can get up to the car.

[21] I don't think, for instance, that the scope of the search is limited by how fast the defendant can run. Once the officers saw him in the vehicle, I don't think it's a foot race to see whether the officers can get to the vehicle before the defendant steps out and walks a few steps away from the vehicle. And I think that's what the effect of granting the motion would be, is to say that the defendant controls the scope of the search by how fast he can walk or run.

Now, I'd be glad to look at the *McLaughlin* case, but it sounds to me as if that tends to come down on the side of the Government here. But if you want to submit Memorandum, I'd be glad to listen – to read

them. I wanted to tell you where my thought processes are right now. If you want to submit further Memorandum, I'd be glad to take a look at them.

MR. KIMBLE: Your Honor, if I could have an opportunity, you know, to at least do so, if you feel it would be of assistance to the Court, if the Court would give me a couple days to do that.

THE COURT: Certainly. How is – this is the 22nd of May. How is this Friday?

MR. KIMBLE: That's fine. And what I can [22] do is I can inform the Court if I feel that no further briefing is needed.

THE COURT: If I intend to still deny the motion, I will simply say Motion is denied for the reasons set forth before in court rather than write out a full opinion.

MR. KIMBLE: Very good. May I just, for the record, make further argument –

THE COURT: Certainly.

MR. KIMBLE: – regarding the Court's –

THE COURT: Absolutely.

MR. KIMBLE: – issues?

The issue about whether Mr. Gant – the method which Mr. Gant is leaving the vehicle I think is addressed in the actual report by Officer Griffith, who

states, I watched Mr. Gant's vehicle as he was walking from the vehicle, which I suggest does not indicate some sort of foot race on either part to try to thwart the officer or the officer to thwart Mr. Gant's exit from the vehicle.

It appears, rather, that the circumstances are such that Mr. Gant was leaving the vehicle, having parked the car where he intended to end his journey, not a situation where somebody is being pursued by a vehicle, stops, gets out, and runs away [23] from the vehicle as part of pursuit. This is an individual who has voluntarily left the vehicle not knowing that he is going to be arrested, not suspecting that the officers have any intention of detaining him or searching his vehicle. So it is not that he is doing anything, I believe, to thwart the officers by the method of his departure.

I think there is no more justification than if the officers, having seen the officers, were at Dunkin' Donuts, and across the street they saw somebody pull up who they personally knew had a warrant out for them, get out of his vehicle, go into a bar; the officers finish their coffee and donuts, and then later decide to go over and arrest the individual and say, You know what?, we're going to search the vehicle as well; there, I think, just as much as in this case. The individual had removed himself from the vehicle absent the intervention of law enforcement.

And I think it makes a distinction because I think these other cases – and I'll look up *McLaughlin*

as to this particular point – deal with where the officers have made the stop or have initiated the contact with the defendant, is aware is being initiated while the defendant is in contact [24] with the vehicle. And that, therefore, there's reason to think that the defendant may have done something in connection with the vehicle, secreted a weapon, done something with evidence that they would have to address.

That's my further record, and I'll brief further if I deem appropriate.

THE COURT: I appreciate it. Thank you.

Anymore the State wants to add?

MR. DIEBOLT: No, your Honor. Thank you.

THE COURT: Thank you. I'll look forward to the memo.

MR. KIMBLE: Thank you, your Honor.

(Proceedings concluded.)

[25] CERTIFICATE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, Cheryl Cesare, do hereby certify that as an Official Court Reporter for the Pima County Superior Court, I reported the foregoing proceedings to the best of my skill and ability; and that the same was transcribed under my supervision via computer-aided

transcription; and that the foregoing pages of typewritten matter are a true, correct, and complete transcript of all the proceedings had as set forth in the title page hereto.

/s/ Cheryl L. Cesare
CHERYL CESARE, CSR, RMR
CSR No. 10318 (CA)
Official Court Reporter

Jan. 2, 2001
date

My Commission Expires:

January 31, 2002

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. CLARK MUNGER
CASE NO. **CR-20000042**
DATE: June 5, 2000
COURT REPORTER: NONE

STATE OF ARIZONA

VS.

RODNEY JOSEPH GANT

MINUTE ENTRY

IN CHAMBERS RULING ON MOTION TO SUPPRESS:

Pursuant to the Court's minute entry of May 22, 2000, the Court notes that Counsel have not filed supplemental memorandum, therefore,

IT IS ORDERED the Motion to Suppress is **DENIED.**

cc: Hon. Clark Munger
Criminal Calendaring
County Attorney-Mark Diebolt, Esq.
Philip Kimble, Esq.

Mary Bailey/MM
Deputy Clerk

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,	)	2 CA-CR 2005-0037
Plaintiff,	)	DEPARTMENT B
vs.	)	CR-2000 0042
RODNEY JOSEPH GANT,	)	
Defendant.	)	Tucson, Arizona

BEFORE: HONORABLE BARBARA SATTLER

EVIDENTIARY HEARING
November 1, 2004

APPEARANCES:

Mark Diebolt, Deputy County Attorney, and Eric Olsson, Assistant Attorney General, on behalf of the State.

Thomas Jacobs, Attorney at Law, on behalf of the Defendant.

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TODD GRIFFITH
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[3] PROCEEDINGS
11-1-04

THE COURT: State of Arizona vs. Rodney Joseph Gant, CR-2000-0042.

Announce your appearances.

MR. DIEBOLT: Mark Diebolt for the State.

MR. JACOBS: Tom Jacobs for Mr. Gant.

THE COURT: Is the State of Arizona ready for the State?

MR. DIEBOLT: I think you may have just been around the alcove there, but this is Eric Olsson from the Attorney General's Office.

This came back to the trial court for determination of facts surrounding. And we are prepared to go forward with testimony and evidence and some photographs. So as the Court likes, I have three witnesses – two.

THE COURT: Mr. Jacobs, any witnesses?

MR. JACOBS: Possibly Mr. Gant.

THE COURT: We will work until 11:30 and then set up a time to finish if we are not finished by then. State, call your first witness.

You may proceed.

MR. DIEBOLT: Thank you.

[4] TODD GRIFFITH,

having been first duly sworn by the clerk, testifies as follows:

DIRECT EXAMINATION

BY MR. DIEBOLT:

Q Sir, if you could state your name and occupation?

A Todd Griffith, officer with the Tucson Police Department.

Q How long have you been employed –

A November of '94.

THE COURT: Since when?

THE WITNESS: '94.

Q (By Mr. Diebolt) Standard background and training to be a police officer, Tucson Police Department?

A Tucson Police Academy and graduated March of 1995, and in-the-field training in uniform, Operations, Division East and West Division.

Q Were you assigned to Tucson Police uniformed patrol on August 25th, 1999?

I know that was some time ago, but do you have recollection of events on that particular day?

A Yes, I do.

[5] Q Were you working as a patrol officer on that day?

A I was working as lead patrol officer in the Operations Midtown Bravo Unit.

Q One or two-man team?

A That particular assignment varied, sometimes one man, two man. That particular was a two-man unit.

Q Who was the other one working with you, other officer working with you?

A Officer Reed.

Q Were you in a marked patrol vehicle on that day?

A I don't remember – I believe we were.

Q Were you in uniform?

A Yes, I was.

Q Did you have the opportunity – just tell the Judge what happened with regard to a Walnut address on that particular day.

A That particular day in the late afternoon responded in reference to an anonymous tip, a possible narcotic activity at that location. We responded to the location and parked on the corner, made contact with the subject who became known to us as Mr. Gant. We asked to speak to the owner of the residence or the person that lived there. He said she was not

there at that point in [6] time, she should be here in the afternoon. We took Mr. Gant's information and departed at that time without making entry into the residence.

Later that evening, Officer Reed and I responded back there, and – let me back up.

Prior to responding back, we ran information that Mr. Gant provided to us, and at that time he had an outstanding warrant, and his driver's license was also suspended.

Went back to contact the resident and walked to the back of the residence, which was primarily the front door, for lack of a better sense, to make contact. Observed the subject sitting under the tree of the back yard area.

THE COURT: Mr. Gant?

THE WITNESS: No, a different subject.

Q (By Mr. Diebolt) Let me stop you there, pick up there in one second.

You went to the house and had contact with an individual, Mr. Gant?

A Yes.

Q And do you remember his first name?

A Rodney.

Q And do you recognize that individual in the courtroom today?

[7] A Yes, sitting in the orange DOC outfit, defense attorney's table.

Q Daytime or nighttime you went?

A During the daytime, late afternoon, but still light outside.

Q And when you went back to the residence, did you go back to the same house?

A Went back to the same house at this point in time.

Q In between those times, do you remember the time, was it dark, in the back?

A It was dark in the back. I don't know the exact time. It is in my report.

Q In the time in between when you went back, did you receive information as to the status of Mr. Gant?

A Yes, we'd done a routine record check on him through the computer and discovered a suspended license and also an outstanding warrant for driving on suspended license.

Q You go back to the house, I think you just testified a moment ago, and encountered another gentleman in the yard area; is that correct?

A That's correct.

Q That person encountered was not Mr. Gant?

A That's correct, it was not Mr. Gant.

[8] Q And just pick up from there, what happened at that point?

A Made contact with the subject, said he was waiting for someone. He gave us a name, I don't recall the name off the top of my head, and asked him how he got there, and he said in the car in front, some lady or female brought him there. At that point in time I believe another officer, Bravo Unit, showed up, made contact. I made contact with the other officer, the vehicle in front of the residence, and found a female sitting in the vehicle. After a short conversation with her she exited the vehicle, and found in her possession, or in her purse that she admitted was hers, was a piece of narcotic paraphernalia, and she was subsequently arrested for that.

A short time later, found out the subject in the back yard provided a false name to the officer and he was subsequently arrested for false information. I believe he had warrants also. As this was transpiring, I was standing in front of the house near the front curb, right by the driveway area. I observed a white vehicle pulling up towards the residence. Previous contact from when we were there before, a white vehicle was parked in the back of the residence, the vehicle pulling into the driveway area. And I shined my [9] flashlight in the vehicle and I observed Mr. Gant, from my previously seeing him.

MR. DIEBOLT: If I may approach, Your Honor?

THE COURT: Yes.

Q (By Mr. Diebolt) Did you testify that you were standing in front of the residence?

A In front of the residence by the curb, or at the curb-driveway area.

Q And did the vehicle pull into the driveway of the residence that you were –

A Yes, it did.

Q And while it drove into the residence, how close – approximately, did the car get to you, how far away from the driver's side?

A Maybe three feet.

Q And at that time, did you have your flashlight?

A Yes, I did.

Q Was your flashlight illuminated?

A Yes, it was.

Q Was it pointed in the direction of the car?

A Yes, in the driver's compartment of the vehicle, yes.

Q Did you determine who was driving the car?

A Yes, I did.

Q Who was that?

[10] A Mr. Gant.

Q I will show you a series of photographs marked 1 through 10, just flip through those and see if you recognize what those are.

A I recognize these as photographs of the residence on North Walnut.

Q Since this happened in 1999, have you had the opportunity to go back to that residence, 2524 North Walnut in Tucson, to look at the area again?

A Yes, I have.

Q And was that when those photographs were taken?

A Yes, it was.

MR. DIEBOLT: Move for admission of 1 through 10.

MR. JACOBS: Foundation. May I voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. JACOBS:

Q Does it appear substantially the same as it did on the date and time that you arrested Mr. Gant?

A The foilage [sic] is but there is additional fencing not there previously.

Q Could you indicate to the Court which fencing that is?

[11] A Certainly. Reference the fencing and such, the picture in front of the residence, there is a wood fence, wood slat fence, not there previously.

Q Is that the red fence?

A I guess red-stained fence, I guess you would call it, in front of the house, and chainlink fence in front of the residence, that was not there at the time of our initial contact.

MR. JACOBS: No other questions other than that on voir dire.

THE COURT: Any objection?

MR. JACOBS: No, Your Honor.

THE COURT: 1 through 10 will be admitted.

DIRECT EXAMINATION (Cont.)

BY MR. DIEBOLT:

Q I want to be specific and talk to you about when Mr. Gant drove the car by you, where did it appear to you as heading at that point?

A Appeared that he was heading into the driveway.

Q Did he go in the driveway?

A Yes, he did.

Q What happened when he went into the driveway?

A He pulled into the driveway, all the way to the [12] end where the car previously parked against, I guess you call it the east side of the driveway area, sort of in the center of the driveway or parking area of the driveway.

Q Did the car come to a stop?

A Yes, it did.

Q And what did you do at that point?

A Once the vehicle passed me in pulling in, I began walking towards the direction where the car was driving to.

Q Is that area that you are talking about, a dirt driveway area?

A That's correct.

Q Is that depicted in one of the photographs 1 through 10

A Yes, it is.

Q So as you were walking, what happened, were you making observations of Mr. Gant?

A I was watching the vehicle and Mr. Gant, once the vehicle stopped, the driver's door opened and the subject stepped out of the vehicle. And I

addressed him by name, Mr. Gant, or Rodney, called to him by name, he responded, and I motioned for him to come over towards me. As I am walking towards him, he is walking towards me.

[13] Q So he gets out of the driver's side of the vehicle; is that right?

A Right. Correct.

Q Is that when you make your verbal contact with him?

A That's correct.

Q To the best your ability to guess, how long is the estimated – how long is the driveway, say, from the street to the back of the car?

A The street to the back of the car, maybe 25 to 30 feet approximately.

Q So as you are walking to him, he is getting out of the driver's side of the vehicle?

A Correct.

Q Once he is out of the driver's side of the vehicle, did you make verbal contact with him?

A Yes, I did.

Q What do you say to him?

A I forget exactly what the words were, hey, Rodney, or Mr. Gant, or something of that nature,

which has got his attention, and he turned around back towards me.

Q At that time you were aware he was driving on a suspended license?

A Yes, I saw him pull in from a public roadway, [14] and driving the vehicle.

Q Was he walking towards you?

A He actually got out of the car. He was getting out of the car and I made verbal contact with him, and I forget if I said come here, or motioned for him to come here, and he started walking towards me as I am still walking towards him, so we met in the middle.

Q So, can you estimate how long him getting – Mr. Gant getting out of driver's side of the vehicle and walking until you were close to meet, how many feet would that be approximately?

A I would say about 10 to 12 feet, not a very large distance.

Q To the best of your ability, how much time had transpired between the time that you stopped and got out of the car and walked and you met him somewhere in the middle?

A Maybe 10 seconds.

Q What I am going to do is hopefully ask you to find a photograph that may depict an area where you met Mr. Gant. Doesn't have to be in order anymore.

A It is marked Exhibit 6, that depicts the area that I made contact with Mr. Gant.

Q That appears to be a picture of you in a different uniform, standing there?

[15] A Yes.

Q And the purpose of your standing there for that that picture is what?

A To show where I made contact with Mr. Gant.

Q The rust or red looking fence was not there prior to that?

A That's correct.

Q So was it a free open area between you and the vehicle?

A Yes, it was.

Q And at that point when you met with him, how many feet had you walked from the street, do you think?

A I walked maybe 18, 20 feet.

Q When you had contact with him, like when you both met in the middle, you depicted that as State's 6, what happened at that point?

A At that point in time I instructed Mr. Gant to turn around and placed handcuffs on him.

Q Was that an immediate arrest?

A That was an immediate arrest, yes, sir.

Q And after, did he comply?

A Yes, he did.

Q And was he placed in handcuffs?

A Yes, he was.

Q What happened – were there other officers on [16] the scene around this time?

A Yes, there were.

Q Was Officer Reed there?

A Officer Reed was there, Officer Nolan, and another officer out front, dealing with the female, Officer Ambrose, and I believe Officer Griffin was there, also dealing with the female in the vehicle.

Q Once he – what was he placed under arrest for?

A Placed under arrest for driving on a suspended license.

Q And did –

MR. DIEBOLT: May I have a moment, Judge?

THE COURT: Yes.

Q (By Mr. Diebolt) You have been a police officer since '94, I think you testified to; is that correct?

A That's correct.

Q And have you in that time arrested individuals?

A Excuse me?

Q Have you placed people under arrest?

A Yes, I have.

Q That do you generally tell them they are being placed under arrest?

A It all depends on the circumstances. Generally

[17] it is as quick as getting the handcuffs on them, and there's certain officer safety things involved in this also. If sometimes you say that they are under arrest, they begin that combat stiff. I – generally I practice things, I place the handcuffs and then explain after that when necessary.

MR. DIEBOLT: Did you, after that point that you placed the handcuffs, did you, around that time, indicate that he was under arrest for driving on a suspended license?

A Yes, I did.

Q And around the time you were putting cuffs on him, were you concerned about –

MR. JACOBS: Objection, leading.

THE COURT: Sustained.

(By Mr. Diebolt) Did you have any concerns when placing handcuffs?

A Some concern reference officer safety. With Mr. Gant in custody, we have three different individuals in custody.

Q The female individual you talked about earlier?

A Yes.

Q Was she associated, I think you had said, drug paraphernalia item?

A That's correct.

[18] Q And do you remember what that item was?

A I believe it was a crack pipe.

Q And the other individual that you talked about, the male?

A Correct.

Q And was there an indication that he provided false information to the police at that time?

A That's correct.

Q And after the defendant, Mr. Gant, was placed – or placed under arrest, what became of him?

A I had one of the officers on scene there, I forget exactly which officer it was, pull a patrol car up

into the driveway area and place Mr. Gant in the back of the patrol unit.

Q If I asked you this, I am sure Mr. Jacobs will remind me. Just for clarification, at the point he parked and walked to you, how much time transpired?

A Eight to 10 seconds.

Q How many feet?

A Ten, 12 feet.

Q After the defendant was placed under arrest, did you say he was placed in a patrol vehicle close by?

A Yes, after he was searched.

Q At some point the vehicle that he had driven up in, was it searched?

[19] A Yes, it was.

Q Do you know which officer did the search of that?

A Officers Reed and Nolan, I believe, conducted the search of that vehicle.

Q To the best your ability, from the time that the defendant was placed under arrest and the search was done of his vehicle, how much time had gone by?

A Not more than a couple of minutes, just long enough to pull the patrol vehicle into the driveway

and place Mr. Gant in the vehicle, I would say maybe two minutes, three at the most.

Q Did you yourself participate in the search of the vehicle?

A No, I was not.

Q Are you aware of any items seized from the vehicle?

A Yes, I am.

Q Now, were you – did you have any – let me start over.

Have you come across individuals associated with drugs as a patrol officer?

A Yes, I have.

Q Have you come across individuals who associated with drugs, who have had weapons?

[20] A Yes, I have.

Q Based on that experience, was the presence or the possibility of weapons ever a concern?

A Yes, it was.

Q You used the term earlier about officer safety, specifically what is officer safety concern?

A Officer safety concern, you have multiple subjects, have the ability to be able to control or contain each subject, maintain separation of subjects, for this purpose. Officer safety pertains to weapons

and such, might be involved in – different subjects might be in contact with blunt objects and what have you, that probably would be the most broad definition that I can give.

Q Have you ever cleared a car or cleared a scene, had to check for weapons, for purposes of officer safety?

A Yes, I have.

Q Would that be standard to do that?

A Generally, yes.

Q Mr. Gant say anything to you about – at or about the time of the arrest, about his license being suspended?

A He said he knew he had a warrant for suspended license.

[21] Q In fact, was a handgun located in the vehicle?

A I believe there was, yes.

Q Let's go back to when Mr. Gant was driving by you, did you make any contact with him as he was driving into the driveway when you were standing, I think you said, three feet away or something?

A Other than shining my flashlight inside of the vehicle and identifying him as Mr. Gant for his contact, there was no verbal contact, no.

Q The first verbal contact, fair to say, Mr. Gant started getting out of the vehicle?

A That's correct.

Q Do you remember, this is August 1999, do you recall if the window was up or down on the vehicle?

A I don't recall that.

Q When you made contact with him, was he all the way in the vehicle, partially out of the vehicle, or all the way out of the vehicle when you first made verbal contact?

A The driver's door was open, he's partially out of the vehicle.

Q Was there a portion of his person still in the vehicle when you said something to him?

A Yes, there was.

Q What was in the vehicle, was it part –

[22] A Most of his torso and his legs were outside the vehicle, the better part of his torso and right side was still inside the vehicle.

Q Fair to say, someone might spin with the legs off and the driver's door, using the –

MR. JACOBS: Objection, form.

THE COURT: Sustained.

Q (By Mr. Diebolt) How did he get out of the car, do you recall?

A He stepped out of the vehicle left leg first, and exited sort of standing up.

Q Were you watching him the whole time?

A Yes, I was.

Q The front of the car, and I just want to do this for the photographs' purposes, you still have those in front of you?

A Yes, I do.

Q Do you remember the type of car it was?

A It was a white Ford, smaller vehicle, like an Escort or something like that, if I recall.

Q For the purpose of the record, did the front of the vehicle – there is a big tree there, looks like a big tree in the corner of the vehicle, was in front of the vehicle, where was the vehicle associated with that tree?

[23] A In photograph 1, in relation to the tree in – the tree is slightly off to the left of the center of the photograph. The car was parked nose in, and the front left portion of the vehicle was just to the right side of the tree as depicted in the photograph. In the photograph here is like an ATV off the righthand side. Between the ATV and the tree.

THE COURT: May I see it.

Thank you.

Here you go, in case you need it.

THE WITNESS: Thank you.

Q (By Mr. Diebolt) In your determination as a police officer, in your training and experience, was Mr. Gant the recent occupant of that vehicle –

MR. JACOBS: Objection, form.

THE COURT: Overruled.

(By Mr. Diebolt) – when the arrest happened? I know it sounds like a silly question.

A Yes.

MR. DIEBOLT: That's all I have.

THE COURT: Mr. Jacobs?

CROSS EXAMINATION

BY MR. JACOBS:

Q Let me clarify something first, Officer.

[24] Mr. Diebolt asked you a question about recent occupancy. That is a question even our U.S. Supreme Court couldn't answer. Did you answer him that yes, it was silly question, or yes, Mr. Gant was a recent occupant of the vehicle?

A Yes, Mr. Gant was a recent occupant of the vehicle.

Q Out of curiosity, since you answered, how long does someone have to be out of a vehicle when they are not a recent occupant?

A My personal – if I lose sight of the person and the – the person in the vehicle, in the same exact vehicle, that I can't put them inside that vehicle anymore, that would be my determination, but I had visual contact of Mr. Gant from the time he pulled into the driveway and got out. I made face contact.

Q If I got five officers in the room, same room, and asked them recent occupant, they would give the same answer?

MR. DIEBOLT: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, I believe they would.

MR. DIEBOLT: Objection.

THE COURT: Overruled.

THE WITNESS: Recent contact with – made by an [25] officer, within a short period of time

Q (By Mr. Jacobs) What short period of time?

A Officer's discretion. The short time, if I watched the vehicle in surveillance, watched the subject in the vehicle, and the subject returned to the vehicle, recent occupant of that vehicle, no one else was inside that vehicle since the time the subject I watched exit and reenter that vehicle.

Q Could be what is going on in the vehicle?

A In broad terms. In this case, for this particular case, recent occupancy for this particular – I watched the subject exit the vehicle.

Q I understand you feel Mr. Gant is a recent occupant, my question is, can you define recent occupancy, and you said it was a short time. Define what that means.

A Could be very broad. May be circumstances involved in defining them, and I am sure the Supreme Court probably goes with, theirs is very broad, but specific to this case, the definition in this – my definition in this case, is from the time I visualized the vehicle or had visual on the vehicle, and I identified Mr. Gant inside vehicle and made contact with Mr. Gant in the vehicle, I had not lost visual sight or contact with Mr. Gant in the vehicle from the time it [26] pulled into the driveway to the time he was taken into custody, until the time of the search.

Q During the time that you observed Mr. Gant, did he make an attempt to get back in the vehicle?

A No, he did not.

Q Did you see any weapons in the vehicle –

A I didn't see any at the time.

Q Would that be a no?

A That is a no.

Q From the time that you placed the handcuffs on Mr. Gant, were you aware of a weapon in his vehicle?

A No, I was not.

Q When you and the officers placed Mr. Gant in the patrol car that drove around to that location, at that point in time when Mr. Gant was placed in the patrol car, did you know that there were any weapons in the vehicle, Mr. Gant's, vehicle?

A No, I did not.

Q In fact, you did not search Mr. Gant's car, did you?

A No, I did not.

Q Until you were told by the other officers that did the search, you didn't know there was ever a weapon in Mr. Gant's vehicle; is that correct?

A That's correct.

[27] Q Mr. Gant's – this happened five years ago; right?

A Yes.

Q Actually, a little over five years, August?

A That's correct.

Q What materials have you reviewed for this hearing other than your narrative report?

A My narrative report and going back out to the scene and taking these particular photos.

Q Do you know what happened to Mr. Gant's vehicle since then?

A Not since then. Know that particular evening it was taken to the Midtown Substation and subsequently impounded.

Q Did that vehicle have window tinting?

A I don't recall.

Q Windows were up?

A I don't recall.

Q Do you remember if it working air conditioning?

A No, I don't.

Q When Mr. Gant pulled up and began to exit his vehicle, his door opens and his foot hits the ground, how far away from him were you?

A At that point in time, was maybe 18 feet.

Q Now, Mr. Gant went, from that position, where [28] did he go, which direction did he head?

A He exited the vehicle and – shut the door and walked towards me.

Q Did he ever go to the side door of the house?

A No, he initially walked that direction, but walked towards me –

Q That was my question, did he go any other direction other than the walk towards you?

A I stepped away from the vehicle, like towards the house, could have been he had to go toward the house, or the door.

Q At that point you called to him and he changed his direction?

A I called to him, and – as his foot spun around, the door opened, and I called to him.

Q You call him more than once?

A Just once, that I recall.

Q He didn't respond right away?

A He looked back at me and acknowledged my presence.

Q And then took a step towards the house?

A As he exited the vehicle he stepped back from the vehicle and shut the door. And he took one step, and I directed him towards me, and he walked towards me.

Q Did you walk 18 to 20 feet that you had to [29] walk?

A We met in the middle. He maybe walked eight, ten feet, and we met in the middle.

Q So how far away from his vehicle was Mr. Gant at the time that you had your conversation with him?

A At the time of the verbal conversation?

Q Yes.

A About how far away was he from the vehicle?

Q Yes.

A He was in the vehicle, stepping out.

Q Not when you called his name, when you actually had the conversation with him.

A When I had the conversation with him?

Q He came over to you, met in the middle and exchanged words?

A Directly put in handcuffs. And I had him turn around and placed handcuffs on him.

Q The first thing you did was arrest him. How far away from Gant's car was he from when you arrested him?

A As stated previously, eight to ten feet.

Q Was the door open or closed?

A It was closed.

Q Was it locked or unlocked?

A I don't recall.

[30] Q Did Mr. Gant have keys on him for the vehicle?

A Yes, he did.

Q What, if any, evidence of driving on a suspended license were you expecting to find in Mr. Gant's vehicle that was searched?

A Search incident to arrest, he was in the vehicle.

Q That's not my question. My question is, Mr. Gant was arrested for driving on a suspended license?

A Correct.

Q An outstanding warrant for the same?

A Correct.

Q Some evidence of driving under a suspended license that you expect would be in the vehicle?

A I didn't search the vehicle.

Q That's not my question. My question was, did you expect that, if that vehicle was searched, there would be evidence of driving on a suspended license in the vehicle?

A I don't know, I didn't search the vehicle.

Q What evidence of driving on a suspended license could you possibly find in a vehicle that somebody was driving, other than just seeing their license showing expired or cancelled?

A License paperwork from the court system, [31] advising them that the license had been mailed to them.

Q Well, you knew that because it was in the computer?

A Yes.

Q His knowledge of that assumption didn't really affect his arrest because you had a warrant?

A That's correct.

Q You weren't looking for evidence of driving on a suspended license, is that fair?

A I wasn't searching the vehicle, so –

Q You testified about reasons that vehicles are searched. In your experience, would those officers have been looking for evidence of driving on a suspended license, or the other concerns that you had?

MR. DIEBOLT: Objection, form, speculation.

THE COURT: Sustained.

Q (By Mr. Jacobs) Do you know why the search was instituted?

A Search incident to arrest.

Q Why?

MR. DIEBOLT: Same objection.

THE COURT: Overruled.

THE WITNESS: Mr. Gant was in control of the vehicle, under appropriate laws the subject is arrested. And the vehicle involved is subject to search [32] incident to arrest and also the defendant, who had access to it.

Q Why?

A Because the law says we can do it.

Q You had concerns related to weapons in the vehicle and other things like that?

A Yes.

Q And what I am asking you is, why was that vehicle searched other than because we can?

A Officer safety reasons also are involved in this. But, again, I did not search the vehicle.

Q I asked you, why was the vehicle searched?

A And, again, I did not search the vehicle.

Q So you don't know why?

A No, I didn't request the vehicle be searched and I didn't search the vehicle.

Q Okay.

Mr. Gant was placed into handcuffs, and then approximately how long did you wait before the vehicle came around into the driveway to put him in it?

A Maybe a minute, minute and a half, wasn't very long at all, a patrol car parked right in front of the house.

Q Five or six officers on the scene at that time?

A About five officers on the scene at that time.

[33] Q Where were the other two arrestees, the woman and man giving the false information?

A One arrestee, the gentleman, had been placed in the back of the patrol car that was in front of the house, and the female was being talked to by a couple of officers in the front of the house, and that's where the other two arrestees were at.

Q Was she under arrest at that point, the woman?

A Yes, she was.

Q Was she handcuffed?

A If I recall, yes.

Q Do you know how many individuals were with her when she was being talked to in front of the house?

A No, I don't recall.

Q Was she seated or standing?

A I don't recall.

Q Do you know which officer or officers were with her?

A I don't recall exactly which ones, no.

Q How do you know she was in front of the house?

A That's where I left her with the other two officers, at least two officers.

Q How long before coming over and arresting Mr. Gant had you left her there?

A Seconds.

[34] Q After you put Mr. Gant in the back – did you put him in the back of the patrol car?

A Yes, I did.

Q Where did you go after that?

A I don't recall exactly where I went. I went to go back – I don't recall exactly. I was right there in the immediate area of the patrol car, Mr. Gant, because he was still there under my supervision.

Q Mr. Gant was in the patrol car. Was the door closed or open?

A Closed.

Q Was it locked, you can't open it from the inside?

A Can't open from the inside.

Q Mr. Gant was not able to get out of the vehicle unless he broke a window, is that fair to say?

A Fair to say.

Q Are the windows made of stuff that is harder to break than normal window glass?

A Not that I know of.

Q Did you stay with Mr. Gant while his vehicle was being searched?

A I believe so, yes.

Q While his vehicle was being searched, did you know who was with the guy, the other fellow that was [35] arrested, in the patrol car?

A I don't recall.

Q Just to summarize, you had three – at one point after Mr. Gant was arrested, you had three people in custody?

A Including Mr. Gant, correct.

Q Including Mr. Gant. Mr. Gant and this other individual were already in the handcuffs, in the patrol cars?

A Correct.

Q And the woman, you don't know exactly where she was when the search went on?

A I don't recall.

Q Just she was handcuffed and in the front of the house?

A Front area of the house, yes.

Q That's where you last checked on her?

A That's correct.

Q Did you call one of the officers to bring his car around, or did he just bring it around?

A I forget how that transpired. I asked one of the officers that was within earshot to bring your car up here, or something of that nature. I don't know exactly what it was.

Q Do you recall which officer?

[36] A I don't recall.

Q Was there anyone – other than the several officers on scene and the three arrestees, were there other people hanging around?

A No, there wasn't, but we were still waiting for someone else who might show up.

Q Was there any indication that there were other people in the house?

A No, there wasn't. I believe contact was attempted at the house, no answer at the door, but still had to make contact with the female Mr. Gant said lived at the residence.

Q Did you believe she was in the residence, was there any indication that she was in there?

A No indication, no. Lights were off and no sound from inside the residence

Q So it was the several officers and the three arrestees at that point?

A Correct.

Q Okay. And was that about the same when the search of Mr. Gant's car was being conducted?

A I believe so, yes.

Q At the time the search was conducted, would you say the scene was secured?

A To a certain extent. We were anticipating the [37] arrival of alleged residents.

Q Were you in public station?

A I don't know.

Q Were you as clear as you could be at that point?

A Theoretically, yes.

Q Do you think that there was any reasonable possibility, in your experience, of Mr. Gant getting out of that patrol car, while you were sitting by it there, and getting into his vehicle?

A Reasonably, no.

Q Now, the other fellow in the back of the patrol car, would the same go for him, assuming the door was closed and assuming he was secured?

A Assuming he was secured, yes.

Q With several officers on scene, freak accidents aside, do you think it is likely that the woman who was deemed talked to, assuming still in front of the house, who was in custody, in handcuffs, could have gotten in Mr. Gant's car that was speaking –

A I can't speak for what her position was, and I can't – fully secured by the officers, being watched the entire time, strange things have happened.

MR. JACOBS: That's all I have.

THE COURT: Redirect?

[38] MR. DIEBOLT: Just a few.

REDIRECT EXAMINATION

BY MR. DIEBOLT:

Q You testified this was at nighttime?

A That's correct.

Q And this is a residential area; is that correct?

A That's correct.

Q Were you aware of who, if anyone, was lurking in the shadows, for lack of a better term?

A No, I was not.

Q Were you – did you know if someone was going to show up associated with this house?

A No, I didn't, but in previous conversation with Mr. Gant, he said that the female who lived there was supposed to be back that evening sometime, so we were kind of thinking she may show up.

Q The only time – I think defense counsel asked you, you weren't aware or didn't know of any weapons in the vehicle; is that correct?

A That's correct.

Q And at some point you or other law enforcement were aware of a weapon in the vehicle; correct?

A That's correct.

[39] And that was, was that after the search was done?

A After the search was conducted, that's correct.

Q You testified as to – would it be a good idea, when you are able, to search the vehicle incident – this is based on defense counsel's question, if you are able to search a vehicle incident to lawful arrest for items of criminal evidence and you don't do that, no, we aren't going to do it, and someone later walked up and took those items – not law enforcement, but an individual walked up and had removed those items of evidence from the car, is that a good way to do police work or a poor way?

A That's a poor –

MR. JACOBS: Objection to form, and goes beyond the scope of issue of this hearing.

MR. DIEBOLT: Just following up.

THE COURT: I think, based on your questions, he can ask it, or answer it.

MR. JACOBS: We are now getting into the other people destroying issue, is not the issue of arrest, but a person that is a recent occupant of the vehicle.

THE COURT: I will allow him to answer the question.

Q Did you answer it?

[40] THE WITNESS: That's a poor way to do police work.

THE COURT: Okay.

Q (By Mr. Diebolt) Are you familiar with the term called inventory search of a seized vehicle or impounded vehicle?

A Yes, I am.

Q How was that done, or why is that done?

A Part of our procedures, the police department, Tucson Police Department, can impound – or seize a vehicle, and impound that vehicle to remove any evidentiary items of evidence to put in the storage locker where the evidence would normally go.

Q Could you see whether the window was up or down, could you see Mr. Gant as he drove by you when you were standing at the side?

A Yes, I could.

Q Did you recognize Mr. Gant as Mr. Gant?

A Yes, I did.

Q Your testimony, I believe, you walked a little bit further from the street than Mr. Gant walked from the car to you?

A That's correct.

Q You talked about the reasons to search a car. One discussed was officer safety?

[41] A Correct.

Q Do you want to leave a loaded handgun in an open vehicle while investigation is going on?

A No, you are not.

Q Have you ever done searches incident to arrest to preserve evidence that may be in the car other than the weapon?

MR. JACOBS: Objection, form, relevance.

THE COURT: Overruled.

Q (By Mr. Diebolt) Setting the gun aside, but other items of evidence?

A Yes, I have.

Q And you had testified about items that you could possibly find as to driving on a suspended license in the vehicle; correct?

A Correct.

Q One being a notification to the Court, you testified about the possibility it could be kept in the car; correct?

A Correct.

Q Expired driver's license?

A Correct.

Q Or some suspension notice from MVD?

A Correct.

MR. DIEBOLT: I should be done, Judge.

[42] Q (By Mr. Diebolt) Defense counsel has asked you several questions about being a recent occupant of the vehicle. And I think you answered him on several different occasions. One of your criteria, I think, was you had a – you, as an officer, had a visual of the – you observed the guy driving the car, you observed him get out of the car, and short time later you have contact with him, is that a fair assessment of how you evaluated it?

A That is a fair assessment, without losing visual contact with the subject of the vehicle.

Q And counsel tried to give you hypothetical situations that may cause you to speculate. Would

you – would you consider each case on a case-by-case basis as a police officer?

A Yes.

MR. JACOBS: Objection, leading.

THE COURT: Overruled.

Is this a few questions?

MR. DIEBOLT: I'm sorry, this is my last question.

Q (By Mr. Diebolt) So you stop a guy, or you see a guy get out of his car, see him start to run, and you chase him for an hour, because you are not very fast and he is not very fast, slowly chase for an hour, hour and [43] a half, 12 feet in front of him, can't quite catch up to him, and an hour and a half later could that still be considered recent?

MR. JACOBS: Objection, form.

THE COURT: Sustained.

MR. DIEBOLT: Nothing further.

THE COURT: Any recross?

MR. JACOBS: Just one question.

RECROSS EXAMINATION

BY MR. JACOBS:

Q Were you going to impound this vehicle after arresting Mr. Gant for driving on a suspended license?

A Not at this time, no.

MR. JACOBS: Thank you.

THE COURT: Any reason not to be excused from the hearing or available for the next one?

MR. JACOBS: I would like him available.

THE COURT: We don't know when it will be, someone will let you know.

THE WITNESS: All right.

THE COURT: Mr. Jacobs, you want to go to Judge Borek, I want you to come back so we can schedule further time on the hearing. If tomorrow, I'll be back before noon to let you know what my schedule is.

[44] (SHORT RECESS TAKEN.)

MR. JACOBS: Mr. Gant wants to waive his presence, he wants to go back to DOC.

THE COURT: You understand, Mr. Gant, you have a right to be here at all the hearings, and your –

THE DEFENDANT: Yes.

THE COURT: Your counsel may want you here because he may ask you questions about – he may want you to testify, so I don't know for sure if that is a good idea.

You could not get him back down here for another six weeks?

MR. JACOBS: As a practical matter, Mr. Gant, the distance, and what were testified to, and I don't know when the search was conducted and have no handle on the time factor, that's what I am looking at. I would prefer to have him here, but it is his choice.

THE COURT: Do you realize if you are not here, you waive your right to testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you understand it may be helpful to your counsel to have you testify and to have you be present.

THE DEFENDANT: I pretty much trust him, though.

[45] MR. DIEBOLT: I do have a concern, his not being here. I certainly can't compel him to testify, I am not saying I can. He just has a right to hear all the evidence and decide then if he wants to testify. If he is formally technically waiving his right to testify right now, that lessens my concern. I think that is what he just did. It was pretty quick but that's fine.

THE COURT: Do you think that you have had enough time both to think about this and confer with your lawyer to make this decision?

THE DEFENDANT: Yes, we talked about it on the phone, too.

THE COURT: And you are willing to – you feel like you are willing to leave it in his hands, and that anything that you would have – that he would have needed to talk to you about, you are willing to waive any complaints about that?

THE DEFENDANT: Yes, ma'am.

THE COURT: What I am concerned about is that when this is all over, that there is another petition filed where you are going to say that you didn't have the right to – the right to – your right to testify was taken away from you, and the right to hear the evidence, and haven't had a chance to confer with your counsel about that decision.

[46] MR. JACOBS: This is a direct appeal and not being ineffective assistance of counsel at all.

THE COURT: Obviously, I didn't mean to imply this, I thought it was a Rule 32 in place.

MR. JACOBS: I was appellate counsel, not trial counsel, so –

THE COURT: This is a hearing involving a direct appeal, I don't – what I am concerned about is seeing that you are going to file another petition, and

I need to be clear with you that you understand these rights.

THE DEFENDANT: Yes, ma'am, I do.

THE COURT: Mr. Diebolt, anything you can think of I need to ask him?

MR. DIEBOLT: The only part I am struggling with, can he make an intelligent, knowing, and voluntary waiver of the right to testify. The word intelligent, you know all what the officer is going to say, and we have one officer testified and cross-examined and two remaining. That means two-thirds of the testimony has not been presented so he doesn't know specifically what it is going to say.

THE COURT: Individuals waive their presence at trials from time to time and obviously don't know what will come across. He has a right not to be present, [47] that's an absolute right that he has as long as he gives it up. There are trials where people waive their presence.

MR. DIEBOLT: It's all right to be present.

THE COURT: Says right in the jury instructions, the standard jury instructions say he has a right not to testify and a right to not even appear.

MR. DIEBOLT: I think it is a little different while in custody, but I understand your position.

THE COURT: I don't think so. I have had trials where people refuse to appear, it is not a different right if are you in custody.

MR. DIEBOLT: Mr. Olsson is the expert on that.

THE COURT: Mr. Olsson?

MR. OLSSON: I appreciate that. Because the first time around it didn't make a complete factual record, that was the Court of Appeals' main concern, and wanted to make sure, if possible, that Mr. Gant can participate in – as much as possible in making an actual record. If he is willing to waive, I guess there is nothing, really, the State can do about it.

THE COURT: I don't think they can.

MR. JACOBS: The reason for an incomplete record, counsel stipulated and had the judge state what happened on the record, and there was no testimony, not [48] that Mr. Gant added anything, but nobody testified.

THE COURT: Yes, I read this at one point, and then I don't remember. I just remember off the record the prior judge told me this is a mess, no offense to any counsel.

Mr. Gant, you sure that is what you want to do?

THE DEFENDANT: Yes, ma'am.

THE COURT: If you change your mind at any point, you may be out of luck.

THE DEFENDANT: No, I am not.

THE COURT: Are you absolutely clear?

THE DEFENDANT: Yes, I trust him.

THE COURT: You don't want to testify?

THE DEFENDANT: No, ma'am.

THE COURT: And you don't want to be here and hear the rest of the testimony?

THE DEFENDANT: No, ma'am.

THE COURT: Someone says something different about the distance and the issues you were concerned about before, you trust Mr. Jacobs to handle all of that for you?

THE DEFENDANT: Yes, he handled me this far, so –

THE COURT: I can order that he not be present?

[49] MR. OLSSON: You could ask him if – his attorney cannot give testimony, if he understands that.

THE COURT: You understand that, your attorney cannot testify, don't you, sir?

THE DEFENDANT: Yes, ma'am.

THE COURT: Anything else?

Are we okay on that date?

MR. JACOBS: Fine.

THE COURT: Still need to do it November the 9th at 10:30, and hopefully get finished, and stay after 12:00 if we have to, make you guys hurry.

And he can go back to DOC immediately, returned to DOC as soon as possible.

THE DEFENDANT: Thank you, ma'am.

(PROCEEDINGS CONCLUDED.)

* * *

REPORTER'S CERTIFICATE

STATE OF ARIZONA)
: ss
COUNTY OF PIMA)

I, Mary E. Bernal, do hereby certify that as an Official Court Reporter of Pima County, Arizona, I was present at the hearing of the foregoing entitled case; that while there I took down in shorthand all the oral testimony adduced and the proceedings had; that I have transcribed such shorthand into typewriting, and that the foregoing typewritten matter contains a full, true and correct transcript of my shorthand notes so taken by me as aforesaid.

Mary E. Bernal
Certified Court Reporter
Certification #50414

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,	) Case No. CR-20000042
Plaintiff,	) 2CA-CR 05-0037
vs.	)
RODNEY JOSEPH GANT,	)
Defendant.	)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tucson, Arizona
November 9, 2004

HEARING RE:
EVIDENTIARY HEARING (CONT'D)

BEFORE: THE HONORABLE
BARBARA SATTLER, JUDGE

APPEARANCES:

MR. MARK DIEBOLT
For the State

MR. TOM JACOBS,
For the Defendant

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[3] PROCEEDINGS

THE COURT: This is State of Arizona versus Rodney Joseph Gant, 20000042, continuation of an evidentiary hearing.

State ready to call your next witness?

I am, Judge.

THE COURT: You may proceed whenever it's reasonable.

MR. DIEBOLT: Detective Reed.

ROBERT REED,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DIEBOLT:

Q Please state your name and your occupation for the record.

A My name is Robert Reed. I'm a detective for the City of Tucson Police Department.

Q And sir, how long have you been employed as a police officer?

A For about 14 years.

[4] Q I want to take you back to August of 1999. Were you employed at that time?

A Yes, sir, I was.

Q Were you a patrol officer at that time?

A I was working as a patrol officer with the community resource team in midtown.

Q And as an officer with the community resource team midtown, on that particular day August 25th, 1999, were you in uniform?

A Yes, I was.

Q Were you in a marked patrol vehicle?

A Yes, I was.

Q Did you have the opportunity to go either by yourself or with other officers to an address on Walnut Street?

A Yes. I responded with Detective – or I'm sorry, with Officer Griffith. We were assigned as a two-person unit that day.

Q How many times did you go to that location on that particular day?

A We had prior on that day one other occasion to be at that location. We had been there and made contact with someone.

Q Prior to – prior to the arrest of Mr. Gant, had you been to that house earlier that day?

[5] A Yes, sir, I did.

Q Had you had contact with anyone earlier that day?

A Yes.

Q Who was that?

A That was Mr. Gant.

Q Rodney Gant?

A Yes, it was.

Q When you returned to that location, just tell the Court what happened when you got back.

A We responded back to the location to try to make contact with the resident that resided there. When we got there there was initially no one – there was a gentleman that – he was to the south of the residence. There's a driveway that goes along the perimeter of the residence. In the back corner of the driveway there was a gentleman that was sitting there apparently waiting for someone. There was a vehicle that was parked in front of the residence. That individual was Mr. Jackie White. We made contact with the individual to ascertain who he was and why he was there.

Q I just want to – what was the original reason for having contact with that residence?

A We had received an anonymous report of narcotics activity at that house.

Q And so when you were there was it to follow up with possible narcotics activity?

[6] A That is correct.

Q And after a contact was made with this individual Mr. White, what happened at that point?

A I asked Mr. White for his name. He provided me with a fictitious name and he indicated that he was there with the person who was in a vehicle in front of the house. At that point in time I stayed with Mr. White at the back of the residence and Officer Griffith responded to the vehicle in front and made contact with the occupants there.

Q Did Mr. White indicate or other law enforcement officers why he was there?

A He indicated that he was there waiting for an individual who had left and was supposed to be coming back.

Q Did he identify that individual?

A It was Mr. Gant, yes.

Q Now, did someone have contact with the female?

A Yeah. Officer Griffith went to the front and there was another officer, Officer Ambrose, that went with him.

Q What happened next?

A I stayed in the back with Mr. White, and a short time later Officer Ambrose came back to me and indicated to me the name that the female had provided for –

MR. JACOBS: I object. This is impermissible hearsay. Its not law enforcement.

[7] THE COURT: Sustained.

MR. JACOBS: Okay.

BY MR. DIEBOLT:

Q Who had contact with the female?

A Officer Griffith.

Q As far as your understanding does she provide information to Officer Griffith?

A Yes.

Q Were you still with Mr. White?

A Yes, I was.

Q At some point did anyone else arrive, not law enforcement, but any other civilians arrive on the scene?

A Yes, they did.

Q And who was that?

A While we were at the residence Mr. Gant drove up in a Ford Escort.

Q Where were you when this happened?

A I was actually towards the front of the residence along the driveway and the road which would be Walnut.

Q Could you yourself – do you have the time of day it happened?

A It was dark. It was the early evening hours, I believe.

Q And did you at some point recognize Mr. Gant as the person you had contact with earlier in the day?

[8] A Yeah. The vehicle was pulling into the driveway, the flashlight was shown into the occupant

area of the vehicle and I observed Mr. Gant in the driver's seat as he was pulling into the driveway.

Q Now, when he pulled into the driveway, did the car come to a stop?

A He had actually pulled to sort of the far end of the driveway about where the house ends on the east side of it and it stopped at that location. While it was doing so, myself and Officer Griffith were walking towards the vehicle as he was pulling to a stop.

Q Who was the first officer who had contact with Mr. Gant?

A Officer Griffith was.

Q And there's a series of photographs with signatures in front. I don't have the number on back. They've been moved into evidence. Have you had a chance to look through those photographs?

A Yes, I did.

Q Were you present when those photographs were taken?

A Yes, I was.

Q Since August 25th have you had the opportunity to go back out to this particular house?

A Yes. I went out on the occasion that these [9] photographs were taken.

Q And do those photographs accurately depict the area that you're talking about in your testimony today?

A Yes. There are some changes to the residence that appear on the photograph here.

Q And what would be a couple of the changes that you've noted?

A Well, along the south side, what would be the southeast corner of the residence, there, is a red picket fence that was not there at the time. And on the back of the residence, east side of the residence, there's now a covered patio that was not there at the location at the time of the incident.

Q Can you find a photograph where Officer Griffith is depicted standing in an area? I don't know which one it is.

A There's a couple with Officer Griffith depicted.

Q Maybe I was just lazy and staying there. I'll move over with the Court's permission.

THE COURT: Sure.

BY MR. DIEBOLT:

Q I'm going to refer to State's 6. Do you recognize that area that's depicted there?

A Yes, I do.

Q Do you recognize where Officer Griffith is [10] standing?

A Yes, I do.

Q What's the significance of that area?

A That would be the approximate area of where Officer Griffith contacted Mr. Gant after he exited the vehicle.

Q Thank you.

Could you estimate for the Court the – let me make sure I have this clear, and then I'll ask a follow-up question. That is did Mr. Gant stop the car?

A Yes, he did.

Q Did he get out of the car?

A Yes, he did.

Q Once he got out of the car, where did he go, which direction did he head?

A He was walking roughly towards the back of the house. The house itself has a front entry that faces Walnut and has a back entry on the east side of the house. The front entry at the time, the one that faces Walnut, was not utilized. When we made initial contact with the residence that entrance was secured, and Mr. Gant was on the east side and he was walking basically toward that area after he had exited the vehicle.

Q Now –

MR. JACOBS: I don't know if we have witnesses [11] under the rule that has been previously invoked in this hearing. I notice these, Judge.

THE COURT: I don't think it was invoked.

MR. JACOBS: We did initially invoke. We had officers sitting out in the hall.

MR. DIEBOLT: I don't recall it being invoked. I don't have –

THE COURT: You know, I really don't recall. Let me see if it indicates on the minute entry. You certainly can invoke it now. So let me see. I thought there were some witnesses sitting in.

No. Do you want to invoke it?

MR. JACOBS: Yeah.

THE COURT: I'm sure that you all know the rule not to discuss your testimony with each other until after the case is over.

WITNESSES: Yes, ma'am.

THE COURT: Only speak with the lawyers.

Who's going to be a witness that hasn't testified and I gather this is your investigating officer?

MR. DIEBOLT: Griffith has already testified.

THE COURT: Is there any chance you're going to call him back?

MR. JACOBS: Yeah. He was asked to remain in case he's called.

[12] THE COURT: And the gentleman in the back is not testifying.

MR. DIEBOLT: Well, I don't think so.

THE COURT: You don't know.

MR. DIEBOLT: He's actually here as an observer with the Attorney General's office. I just met him today.

THE COURT: All right.

MR. DIEBOLT: I forgot where I was.

THE WITNESS: We were discussing where Mr. Gant had exited the vehicle, was walking back towards the corner of the house.

BY MR. DIEBOLT:

Q Now, was there contact between Mr. Gant and Officer Griffith?

A Yes. We were walking up to the vehicle. As it was pulling to a stop as soon as Mr. Gant exited the vehicle Officer Griffith indicated to Mr. Gant, we need to speak with you. So we were actually walking in convergence together. We were toward the corner of the house and we were walking towards him.

Q How far were you – that's a bad question. Let me put it this way. You testified that Officer Griffith had first contact with Mr. Gant; is that correct?

A That's correct.

Q Was he placed under arrest soon thereafter?

[13] A As soon as we made physical contact with him.

Q So Gant got out of the car and Officer Griffith placed him under arrest.

To the best of your ability since you've been back out to the scene and kind of looked – to the best of your ability how much time had transpired, was it a long period of time?

A It was only a couple of seconds. If you look at State's Number 5 it depicts a photograph of Officer Griffith and that is the approximate location of where I saw him call out to Mr. Gant as he was exiting the vehicle. So it would be the time span from – the distance of time it would take Officer Griffith and I to walk from Exhibit Number 5 to Exhibit 6 which is maybe 8 to 12 feet, so only a couple of seconds, two, three seconds.

Q And how much distance did Mr. Gant travel before he was placed under arrest from the vehicle?

A It would be approximately the same distance because if you look at States's [sic] 5 and 6 you can see there's a gray Nissan pickup truck that's parked in the driveway. As I mentioned before the picket fence wasn't there at that time. Mr. Gant was parked further east than that. His back quarter panel was approximately where either half the vehicle or the

back half of the vehicle would be approximately where that picket fence was. So it was only [14] the distance it would take him to exit the vehicle and walk to maybe 8 to 10 feet to where we made contact with him.

Q So it's your testimony it was a matter of seconds prior to the contact with Officer Griffith?

A Yes. It would be the closing distance from the time we made contact with him verbally to actually close the distance to him physically.

Q Now, when you made – I just want to make it clear for the record the term physical contact, would that be –

A Within close proximity, two to three feet.

Q Would the physical contact actually be the arrest that we're talking about?

A Oh, yes. We immediately took him into custody. We knew that he was in violation.

Q Were you aware prior – were you aware that as Mr. Gant was driving up that he had a suspended driver's license?

A Yeah. When we made the initial contact with him that day because of the nature of the offense we went back and we did a check on Mr. Gant and we discovered that he had a suspended driver's license.

Q Was there – did you discover if there was any drug associated paraphernalia or items with the female?

A Yes. She was arrested for a paraphernalia [15] violation.

Q Now, once Mr. Gant was arrested, what became of him?

A Mr. Gant was secured in the vehicle. We had – at that point we had three individuals that we had to secure. We had the female who was originally in the front vehicle.

Q She was associated with what as far as?

A She was associated with paraphernalia or the vehicle. She had a crack pipe so she was arrested for the paraphernalia.

Q And Mr. White?

A Mr. White was initially arrested for, I believe, a warrant.

Q Did he provide false information to law enforcement?

A Yes, he did.

Q And then Mr. Gant was arrested for the driving on a suspended license and secured in the vehicle?

A Well, initially we didn't have a vehicle to secure him. We had already secured Mr. White in one

vehicle, and like I said Officer Griffith and I responded to the scene with a vehicle. Officer Ambrose – we had a second vehicle we could secure Ms. Porras in, which was the female. Once we had Mr. Gant we had to call for Officer [16] Nolan to respond so we could secure him in the vehicle and maintain the security of the area of the two other prisoners.

Q Now, did you see the vehicle that Mr. Gant drove up in?

A Yes.

Q Did you see the vehicle that Mr. Gant got out of?

A Yes.

Q Was that vehicle searched incident to his arrest?

A Yes. Once we had – once Officer Nolan arrived there we had another vehicle we could secure Mr. Gant. After we secured Mr. Gant, I searched one side and I asked Officer Nolan to search the other side of the vehicle. After I had searched my side he had asked me, he asked to switch, and I double checked.

Q Would that be a common practice for searching a vehicle?

A To have somebody double check. It's common practice for me to do that. I routinely ask others to double check an area to make sure that I didn't miss anything.

Q Were there items of evidentiary value found in the vehicle?

A Yes, there was.

Q In fact, were there drugs found in the vehicle?

[17] A Yes.

Q Was there a weapon found in the vehicle?

A Yes, sir, there was.

MR. DIEBOLT: Can I have just one moment, Judge?

THE COURT: Yeah.

BY MR. DIEBOLT:

Q At some point you had indicated there was a warrant for the arrest of Mr. Gant; is that correct?

A That's correct.

Q Did you know what the basis for the warrant was?

A For Mr. Gant?

Q For Mr. Gant.

A Yes.

Q What was that?

A I believe it was driving on a suspended license.

Q In the vehicle, based on your training and experience, could you have located items of evidence with regard to a driving on a suspended license charge in Mr. Gant's vehicle?

A Yes.

Q Would it be unusual to find an item of evidence that may assist police in the investigation of driving on a suspended license?

A No, not necessarily.

Q For example, just give us an example what [18] possibly could be found in a vehicle of someone who's been stopped for driving on a suspended license.

A For example, if you had a warrant as well, find notification of the warrant, also find notification from Motor Vehicle Division that his license had been suspended. You could find his driver's license itself. You could find a notification from another officer who had made a stop and issued a citation for a suspended license that would show that he had knowledge that his driver's license was suspended. There are a number of things you could have found.

Q In a scenario such as this one where you have three individuals, were you aware or did you know if anyone else was going to appear on scene, individuals, not law enforcement but –

A When we spoke with Mr. Gant earlier in the day, when we had initial contact he indicated to us

that he wasn't the resident who lived there. That is the primary reason that we returned later that day to make contact with the resident to do a consent search type of investigation to see if they would mind if we came into the residence and looked around.

So at the time that we had contact with Mr. White and Ms. Porras and Mr. Gant as far as we knew there was one other person that resided at the residence that we hadn't [19] contacted yet. We didn't know if that person was inside or whether they were yet to arrive.

Q And in a situation where you have three individuals possibly associated with some drug activity and the unknown factor that an additional person may come to the scene, and an individual – I mean a civilian person, is officer safety an issue in that type of scenario?

A Officer safety is always an issue in a situation like that. It's a suspected drug activity area. It's not unusual for weapons to be involved in drug areas because people maintain weapons because they want to protect themselves not necessarily from law enforcement but also from other drug users or people might want to rob them of their drugs or money.

As I mentioned before, we were at least reasonably aware that there may be somebody in the house because we hadn't made contact with the house the second point in time yet, and Mr. Gant had prior told us that he was not the resident so –

Q Would looking in the vehicle of Mr. Gant be consistent with addressing concerns for officer safety? In other words, would it be important to look in the vehicle to see if there was a weapon in there?

A Well, certainly. Like I said, the primary reason that we were there was for suspected narcotics activity. As [20] I mentioned before in my experience of 14 years working with drug cases that it's not unusual for somebody who's involved in narcotics or in a narcotics area to have a weapon available to them. And it's routine for individuals to abandon property in a vehicle and exit the vehicle before law enforcement makes contact with them.

MR. DIEBOLT: Just one more moment, Your Honor.

THE COURT: Uh-huh.

BY MR. DIEBOLT:

Q In anticipation perhaps of Mr. Jacobs' cross-examination and because he asked the other officer this I'll open the door and ask you a question about the terminology recent occupant. Based on this scenario and you know the facts, you were there, based on your training and experience, would you, based on these facts, consider Mr. Gant to have been a recent occupant of that vehicle?

MR. JACOBS: Same objection as before; it calls for a legal conclusion.

THE COURT: Sustained.

MR. DIEBOLT: That's all I have for right now.

Thank you.

THE COURT: Mr. Jacobs.

[21] CROSS-EXAMINATION

BY MR. JACOBS:

Q Officer, were you ready when Mr. Gant arrived at the residence, drove up to the residence, had you already placed Mr. White and the female under arrest?

A Yes, I believe at that point in time we had.

Q Where was Mr. White at that time when Mr. Gant's vehicle drove up to the front of the residence?

A Mr. White was secured in one vehicle, and Ms. Porras was secured in the other police car and we were parked on the roadway.

Q Okay. And that was the status when Mr. Gant drove up?

A That's correct.

Q Okay. Were those individuals handcuffed?

A My recollection they were. It's routine for us to place them in handcuffs before we place them in the vehicle.

Q You place them in the vehicle and handcuffs. Do you close the door so they can't get out?

A It depends on the circumstance; if you're sitting in the doorway talking to them.

Q What was going on then? What did you observe?

A My recollection is that we were actually speaking with one of the individuals parked along the roadway and we [22] were speaking either with the door open or with the door closed and the window down so we can confer with them in the vehicle, so we were actually parked in front of the residence by the vehicle that Ms. Porras was in.

Q Now, my understanding is that when you talked to Mr. Gant earlier when he answered the door of the house, he indicated that the resident – he was the resident or the resident wasn't home; is that correct?

A That's correct.

Q Did you ever come across any kind of information or observe anything suggesting that the resident had somehow returned to the residence after you spoke to Mr. Gant the first time?

A He indicated to us that he expected them to be back. I believe he said it was a female if I remember correctly, that he expected her to be back later that evening.

Q Did you ever see her come back?

A No.

Q In fact, while you were there did the resident ever return?

A Not that I'm aware.

Q Other than Mr. Gant saying he expected the resident to return, you never acquired any other information or made any other observations to suggest that the resident [23] had in fact returned and was in the house; isn't that true?

A Yeah, I don't know whether she was or was not.

Q All indications were that she wasn't home; is that fair?

A I would say that's fair, yes.

Q Now, when you're in a situation where you're out in public doing police work is there – it's only safe to assume a civilian might walk up and come upon your arrest scene?

A Sure.

Q In fact, any time you're conducting any kind of police operation it's always a possibility that a civilian may become involved and who was not initially involved in the scenario?

A Well, I think you need to clarify what you mean by involvement.

Q Walk up to you. They may walk past the scene. They may –

A Right.

Q Anything like that; correct?

A Sure.

Q Was there anything in particular about the situation at this residence involved in Mr. Gant that made this a situation where you felt you had to be extremely vigilant because of the likelihood that somebody might [24] interfere with your investigation or interfere with the scene?

A Well, I would normally be vigilant because of the fact of the investigation, the fact that it's a narcotics type of investigation. Obviously there's more diligence and more of a threat in some aspects than if you were going to a burglary investigation or some other type of investigation.

Q Okay. Now, you had – after arresting Mr. Gant you had three individuals in custody; correct?

A That is correct.

Q And how long was it between the time you arrested Mr. Gant and the time that you put him in Officer Nolan's patrol car?

A It was only the time span it took Mr. Nolan to arrive at the location. Officer Nolan was working in the same detail that we were. He didn't have any

duties to answer a call load. He was primarily we would address problems within that.

Q My question was how much time?

A I'm guessing maybe five minutes. That's just a guess, though.

Q Was Officer Nolan on the scene when you called for his car?

A No, he was not.

Q During the five-minute wait, where was Mr. Gant [25] being detained?

A We were actually standing in kind of the apron area along the sidewalk area along the road and the driveway.

Q About how far from Mr. Gant's car were you at that time as you were waiting for Officer Nolan to arrive?

A I would say maybe 15 to 20 feet.

Q Where did Officer Nolan place his patrol car with reference to Mr. Gant's vehicle?

A If I remember correctly he pulled immediately behind Mr. Gant's vehicle.

Q And after he pulled in behind Mr. Gant's vehicle, did you place Mr. Gant in Officer Nolan's patrol car?

A Yes.

Q Was Mr. Gant handcuffed at that time?

A I believe he was.

Q When you placed him in the patrol car, did you close the doors?

A Yes.

Q In that patrol car you can't open the rear door from the inside; is that correct, the passenger in the back can't hope [sic] the door?

A From the inside, no. If the window is open they can reach out and open the door.

Q Were those windows open?

[26] A I don't remember.

Q Now, at this point you have three people in custody; correct?

A That's correct.

Q How many officers are on scene?

A Four.

Q Who were those officers?

A There was myself, Officer Griffith, Officer Nolan and Officer Ambrose.

Q Were there any undercovers around?

A No, we were all in uniform that day.

Q Okay. After you secured Mr. Gant, how long was it before you commenced search of his vehicle?

A As soon as we secured him we immediately began searching the vehicle.

Q So you took five minutes to get Officer Nolan's car and then how long did it take to get Mr. Gant secured in the vehicle?

A He had already been handcuffed so once Officer Nolan arrived there it was a short matter of opening the door, telling Officer Nolan what was going on, and placing Mr. Gant in the vehicle. Couple of minutes, probably not even that.

Q A minute?

A Probably, yeah.

[27] Q Okay. So at the time you conducted your search of Mr. Gant's vehicle, am I correct that the three individuals you had in custody were all handcuffed and in the back of police cars?

A At the time we began the search?

Q Yes.

A To the best of my recollection, yes.

Q Other than the possibility of the resident returning, do you believe that the scene was secure at that time?

A At that time I think we had enough officers to maintain the security of the officers, the area and officers in that area.

Q Okay. Would you agree with me that at the time you searched Mr. Gant's vehicle it was certainly highly unlikely that Mr. Gant could have accessed anything that was in his vehicle given the circumstances at that time?

A Well, at that point in time he had been secured. He had been secured. He no longer presented a threat to me or anyone else because he had no access to anything else.

MR. JACOBS: That's all I have.

Thank you.

THE COURT: Mr. Diebolt, do you have any redirect?

MR. DIEBOLT: Just briefly, Judge.

[28] REDIRECT EXAMINATION

BY MR. DIEBOLT:

Q Would you feel, sir, based on your training and experience as an officer that it would be important to reduce the risk of destruction of evidence in a criminal investigation?

A Yes, I would.

Q Would it be important to reduce the opportunity for somebody to tamper with evidence?

A Yes, it would.

Q The car you searched with Officer Nolan, was it a big car, small car?

A It's a small car. It's a Ford Escort.

Q To search the Ford Escort do you recall how long it took for you to search it with Officer Nolan?

A Probably about five minutes to conduct a thorough search.

Q During that five-minute period of time was Mr. Gant still on scene?

A Yes, he was.

Q Do you know if that car was impounded?

A I believe it was, yes.

MR. DIEBOLT: I think that's all I have.

Thank you.

THE COURT: Mr. Jacobs, anything?

[29] MR. JACOBS: Just one question.

RECROSS-EXAMINATION

BY MR. JACOBS:

Q Officer, if you had arrested Mr. Gant for driving on a suspended license and given the fact that

the vehicle was parked there at the residence, if that had been all that happened, would you normally impound his vehicle?

A Well, I might. My investigation is based on the totality of the circumstances. As I mentioned before there was certainly the possibility of finding evidence that he could –

Q I'm not asking about the search. What I'm asking is if you arrest Mr. Gant for driving on a suspended license; correct?

A That's correct.

Q Now, normally with his vehicle being parked there and you know at a private residence –

A Right.

Q If you just took him and arrested him, put him in the car and took him across the way for driving on a suspended license, would you normally impound the vehicle?

A No, I wouldn't.

Q If you did impound the car, impound the vehicle was that because of what you found in the vehicle?

[30] A Yes, I would.

MR. JACOBS: That's all.

MR. DIEBOLT: Actually I need a couple of questions.

THE COURT: Always.

MR. DIEBOLT: Always a couple. Well, I'm supposed to get the last opportunity. I'm willing to share back and forth.

I'm just – Tom brought up something I wanted to touch on.

REDIRECT EXAMINATION

BY MR. DIEBOLT:

Q If you impound a vehicle, they take it down to TPD to do an inventory search of the vehicle?

A Yes.

Q Standard procedure?

A That's part of the procedure, yes.

MR. DIEBOLT: That's all I have.

One question. That's all.

THE COURT: All right. You can step down.

Is there any reason why this witness needs to stay, Mr. Diebolt?

MR. DIEBOLT: No.

MR. JACOBS: No, Your Honor.

[31] THE COURT: You're excused.

State call your next witness.

MR. DIEBOLT: The State calls Officer Nolan, I believe.

CORIE NOLAN,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DIEBOLT:

Q Sir, can you identify yourself for the record.

A My name is Corey [sic] Nolan. I'm a police officer with the City of Tucson.

Q How long have you been employed, sir?

A Since July of '97.

Q Back on August the 25th of 1999 were you employed with the Tucson Police Department?

A Yes, I was.

Q Were you on patrol or in uniform on that particular day?

A Yes, I was. And I was assigned to the community response team in midtown.

Q As part of that assignment did you go to a residence on Walnut?

[32] A Yes, I did.

Q Did you go there in response to an officer's request for you to go to that scene?

A Yes, I did.

Q When you got to the scene, what do you recall when you first got to the scene?

A When I first got to the scene I parked on the scene and Officer Reed was up in the driveway, had a white passenger car and there was a couple other officers and patrol cars at the house.

Q Now, were there – when you got on scene were there individuals in custody, in police custody?

A Yes, I was informed there were. Yes.

Q And did you know how many individuals were there in custody on the scene?

A I was informed there were three.

Q What did you do when you got to the scene?

A When I got to the scene I asked Officer Griffith what he would like me to do. He asked me to go up and help Officer Reed searching the vehicle.

Q Did you do that?

A Yes, I did.

Q Was there a big car or small car; do you recall?

A It was white and it was rather small. It was a two-door.

[33] Q And did you search the vehicle yourself?

A I assisted Officer Reed in doing it.

Q Did you and Officer Reed find any items of evidentiary value in the vehicle?

A Yes.

Q Did you search it for – how long did you search the vehicle? How long did it take with a car like that?

A 10 minutes.

Q And were those items of evidence secured?

A Secured by me?

Q Well, just secured by law enforcement?

A Yes, they were.

Q Was there a weapon found in that car?

A Yes, I believe Officer Reed found one.

Q Were drugs located in that car?

A Yes, I located some drugs.

Q When you were doing this, did you have any contact with any of the individuals?

A That were arrested?

Q That were arrested.

A No, I did not.

Q In addition to the weapon and the drugs were there any – was there any ammunition that was found?

A I located I believe it was 23 rounds of .380 ammo, and it was located in the trunk.

[34] Q Was the vehicle impounded?

A Yes, it was.

Q Are you familiar with inventory searches that happen after a vehicle is impounded?

A Yes.

Q Is it consistent for an impounded vehicle to have an inventory?

A By the department, yes.

Q And the items would be documented that are found in the vehicle?

A That is correct.

Q Prior to you searching the vehicle, how long had you been on the scene?

A Only a couple of minutes.

Q And in that time is that when you were asked to assist Officer Reed in searching the vehicle?

A Yes.

Q Do you recall either you or Officer Reed finding a gun in the main compartment of the car or the car itself?

A Yes. I was informed, Officer Reed informed me, that he had found the gun.

Q After the gun was found, did you or any other officers search the trunk of the car?

A I searched the trunk.

Q Okay. And was that because a weapon was found in [35] the main section?

A Yes.

Q So when you do a search like this, is Officer Reed searching one section and you're searching another section?

A He searched one area, then I went over it. I searched, I believe, it was the driver's side and also the rear compartment and he did the front passenger side and then he went back over where I searched.

Q Do you recall where you started searching in the vehicle, would it be the passenger side or the driver's side?

A It was originally the front driver's compartment, then the rear, the backseat compartment where I observed a large jacket sitting on the backseat.

Q When the search was completed or when – at what time was it do you recall when the defendant

was transported to the jail, was it during the search or after the search or do you remember?

A I believe the defendant was transported to the midtown substation originally to be interviewed by a detective.

Q Had the search been conducted by then, do you recall, of the car?

A I believe he was still on scene.

[36] Q Based on what your knowledge of the scene was, did you understand it to be possible narcotics activity?

A Yes.

Q Did you understand it to be more than one individual associated with that scene, civilian?

A Yes.

Q Based on your training and experience, would you – would officer safety be a consideration or concern for you as a police officer?

A Yes, it was.

Q And if you were searching the car incident to an arrest for driving on a suspended license, would it be important to retrieve any items that would be evidence of driving on a suspended license?

A Yes, it would.

Q And could you – well, I'll strike that.

MR. DIEBOLT: That's all I have.

Thank you.

THE COURT: Mr. Jacobs.

MR. JACOBS: I don't have any questions for this witness, Your Honor.

THE COURT: All right. Is there any reason this witness can't be excused?

MR. JACOBS: No, Your Honor.

THE COURT: All right. You're excused.

[37] Thank you.

THE WITNESS: Thank you.

THE COURT: State have any further witnesses?

MR. DIEBOLT: I do not, Judge.

THE COURT: Mr. Jacobs, do you have any witnesses?

MR. JACOBS: No, I don't believe I need to re-call any, Your Honor, and I don't have any defense witnesses.

THE COURT: Okay. Maybe we can tell – maybe you can tell the other officers that they're free to leave unless Mr. Diebolt wants them to stay.

MR. DIEBOLT: They can stay or leave, whatever they want.

THE COURT: Do you all want to argue?

MR. JACOBS: Sure, Your Honor. Only I don't know how – if it's the State's burden since it's my motion.

THE COURT: Yeah, I don't know.

MR. JACOBS: I can go ahead. That's fine.

THE COURT: That's fine.

MR. JACOBS: Your Honor, this obviously has been knocked around in a number of courts all the way to the Supreme Court. In *State versus Dean* it tells us what we're supposed to do. It's a totality of the circumstances test essentially is what we're dealing with here. And the [38] determination that the Court is really interested in making and should be making under *Dean* is whether looking at the totality of the circumstances at the scene there was a reasonable possibility that the defendant who was or some other person who was at the scene posed a threat to law enforcement officers by having access to the defendant's vehicle and the contents such that officers would be justified in conducting a search incident to arrest of an occupant of that vehicle or recent occupant of that vehicle to protect themselves from weapons or to prevent the destruction of evidence.

Now, with reference to the scene overall, I think it's undisputed that pursuant to the – certainly to Officer Reed's testimony which was very candid, Mr. Gant at the time that the vehicle was searched had

been secured in the back of a police car. He was handcuffed and had no access to his vehicle. The other individuals who were under arrest were handcuffed and in the back of police cars. It's possible that the female was being questioned but the officers on scene according to Officer Reed felt that the scene was secured and that the individuals on scene did not pose a threat to officers at that time given the circumstances. So you've got a secure scene, you've got essentially what the State is going to argue a fanciful possibility that the resident might return at some point and pose a threat to the [39] officers, and other than that everything is normal and everything is under control.

At that point the officers conduct their search of Mr. Gant's vehicle. Mr. Gant, of course, has no access. The other two have no access. They find a gun, they find drugs. The State no doubt is going to argue that the vehicle was impounded and later would have been searched anyway, but the officer was candid in saying but for the search they wouldn't have impounded that vehicle. It would have been left at a private residence; but for finding the drugs and weapon they would not have impounded. It's discoverable evidence in this case.

With respect to the distance involved I think it becomes irrelevant how far Mr. Gant was from his vehicle at the time that he was arrested because *Dean* says that's not going to be the issue. What *Dean* wanted to do was avoid the situation where we're having to speculate about what might happen if a

person were 10 feet away versus 5 feet away, and really make an issue of what are the officers trying to protect; under the circumstances was it reasonable for them to proceed in searching that vehicle without a warrant. Keeping in mind that the parties have stipulated throughout these proceedings all up and down the appellate chain there was no probable cause to search this vehicle independent of the search incident to arrest. So that's all they've got [40] there.

I would submit under the *Dean* case coupled in particular with Officer Reed's testimony that suggests that there was no objective threat to law enforcement at the time of that search. Therefore, the search was improper and they should have got a warrant if they felt there was something of evidentiary value in the vehicle.

THE COURT: Mr. Diebolt.

MR. DIEBOLT: I would defer to the Attorney General if the Attorney General wants to –

THE COURT: No objection.

MR. OLSSON: I'm Eric Olsson. I didn't announce at the beginning.

THE COURT: Do it.

MR. OLSSON: So I'm Eric Olsson, Assistant Attorney General for the State.

And I handled this case on appeal for a couple of years. And so I'd like to do the argument with the Court's permission.

This case is controlled locally here in Arizona by *State versus Dean* which held that the original decision in this case by the Court of Appeals requiring contact with the defendant before he got out of the vehicle was not a valid test. The test to be applied is whether the defendant is a recent occupant of the vehicle at the time of arrest.

[41] The crux of this rule is that the search incident to arrest has to be within a reasonably proximate time of the arrest itself. And the problem in *Dean,* although the Court adopted the recent occupancy test, which comes from *New York versus Belton,* they held in *Dean* that too much time had elapsed between the defendant's running from the police, leaving his automobile, running into a house, hiding in the attic for two hours, for over two hours. So although the Court, the Arizona Supreme Court in *Dean, State v. Dean* adopted recently, the *Dean* cases, they failed to apply it in *Dean* because too much time elapsed.

This is a – here they have no amount of time. Before Mr. Gant – he stepped out of his vehicle just a few seconds. This automobile fits the *Dean* recent occupancy test. There's no doubt about that, and no reasonable evidence to refute that.

It's important – Mr. Jacobs focused his argument, his argument on the concerns of the moment in this particular case. *Belton* which is where all – that's where this rule originated – *Belton* made very clear

that the U.S. Supreme Court was not going to apply a case specific officer safety or preservation of evidence test. Instead, they found that these concerns are inherent, are in every arrest involving an automobile and for that reason, they rejected any analysis that would be case specific so this court need [42] not be concerned about whether in this particular situation officers either felt subjectively that there was danger or objectively it was a dangerous situation. Under the *Belton* rule adopted by *Dean,* every arrest proximately to a vehicle, every search of a vehicle incident to arrest is justified by officer safety and evidentiary preservation concerns generally. And the ruling was affirmed very recently in another United States Supreme Court case called *Thornton,* T-h-o-r-n-t-o-n, *versus United States.*

In *Thornton* the situation was very similar to what we have here. An officer was following Thornton but had not alerted Thornton to the fact that he was following him. Mr. Thornton pulled his automobile into a parking lot and stepped out of the vehicle at the same time that the policeman stopped and stepped out of his vehicle, and they approached each other. Their convergence was very much like the convergence we have here. It was just a matter of moments. That was the language from the federal Court of Appeals opinion in *Thornton.* But it was just a matter of moments that they came together.

THE COURT: You say that's a recent case.

MR. OLSSON: It was 2004. I'm sorry, I neglected to bring you the cite.

THE COURT: I can find it.

MR. OLSSON: I do have it right here. It's the [43] Supreme Court number. All I have on this particular copy because it's an advanced sheet, its number 03-5165 argued March 31st, 2004, decided May 24th, 2004. The U.S. Supreme Court held in *Thornton* that Thornton was a recent occupant of the vehicle and that was the dispositive factor. So *Thornton* is nothing but an explanation of the meaning of *Belton,* and again, it's – the most important thing to focus on here is that it's not a case-by-case specific analysis of whether there were dangers, whether evidence or the officers were in danger because *Belton* decided as a matter of policy and matter of law that these concerns are inherent in every arrest.

To put that in perspective, it has to be an arrest if it's a stop, and I'm referring now to *Knowles versus Iowa.* K-n-o-w-l-e-s *versus Iowa,* I believe it is, which contrasts the arrest situation from a stop situation, and they make very clear that it's because of the nature of an arrest that it creates this sufficient – generally creates sufficient dangers and risks to justify a *Belton* search in a situation where there's an arrest and closely associated with an automobile. But not just merely a stop situation.

So in this particular case the test is very simple. This Court should consider those authorities, *Dean, Belton,* well, in the order that they were decided.

Belton, [44] then *Dean,* then I believe *Knowles versus* – no, *Belton* and *Knowles* were decided first, and then the Arizona Supreme Court decision in *Dean,* and then *Thornton versus United States.* And this Court should find simply that Gant was a recent occupant of the automobile at the time of arrest, and that the arrest was conducted immediately after – immediately thereafter. And for those reasons this Court should find that the State has met its evidentiary burden, and that the evidence should not have been suppressed.

THE COURT: Thank you.

Mr. Jacobs.

MR. JACOBS: Thank you, Your Honor.

The State's arguments in this case amplifies the real problem that a lot of legal scholars and a lot of attorneys have had with this kind of situation. The problem is this: If you're in a car and the police arrest you in a car, then *Belton* applies and you get to search the car. That's pretty much how it works.

The problem was what happens if you get out of the car and you run a hundred feet. Are you now – and the police now want to search the car. That was the problem and that's what this case went up on, and that's what other cases have been decided on, and in fact, it's one of the things that *Dean* reflects on and I believe it's footnote 6 in the *Dean* case. In the *Dean* case the State argued that [45] the Court should simply allow officers to conduct a search if the

defendant is determined to be a recent occupant even if he's put distance between himself and the vehicle for the reason that we don't want people avoiding officer searches by jumping out of a vehicle and distancing themselves from the vehicle. What the *Dean* court held and cuts directly against the State's position is that's not a consideration. That's not what the Court is looking for. In fact, in footnote 6, in fact, every step he puts away from this vehicle is – every step away from the vehicle attenuates the justification for the search. Because we have to remember this isn't a search of right, this is a search of exigency. The officers don't have a right. The officers have to show exigency.

This is another mistake legal scholars have been making here. *Belton* said they get to search if you're a recent occupant. What *Belton* says in dicta is the words recent occupant. And it's strictly dicta. It's not part of the holding in *Belton* – if you read *Belton,* and it seems like everybody also before the axle on these terms wound up. Recent occupancy is a creation of the lawyers and the judges in the lower court and not a ruling of the Supreme Court. *Dean* unravels that for us, and that's probably why the Supreme Court remanded this case instead of making a decision. *Dean* takes it very reasonable. *Dean* says if [46] you're in the car *Belton.* If not, what *Dean* – it becomes a *Chimel* test. And in *Chimel* the guys in his – literally sitting on the couch. Officers search the whole house, and the court holds he's on the couch, he's – the officers are with him. It's an arms length

test. It's really what we call reasonable access, and in that case they made a determination.

So the question is when a person gets out of their car, it's not just was he a recent occupant, which we saw officers trying to define on the stand the last time we were in court. It's a legal test. It's not something that officers are going to be making a call on in the field. You can see the problem with that. Whether a person is a recent occupant doesn't have to do with just did the person hop out of the car five seconds ago or five minutes ago. It has to do with totality of the circumstances amounting to the issue of whether the officers waited so long for the search that the defendant no longer was even perhaps on the scene or no longer presented a threat, or the opposite side of that when the officers conducted the search, but the defendant had been out of the car so long that the concerns expressed in *Belton* no longer apply. In other words, the defendant's association with the vehicle had been attenuated so their exigency with searching that vehicle had deteriorated.

We've got those two concerns, the length of time [47] between the time that the defendant is arrested even if he was recently in the vehicle, and the time of the search, and/or the time, the length of time between when the defendant exited the vehicle and the time that the search may be later conducted.

But in addition, what *Dean* tells you is to consider what are the actual circumstances, what is the objective threat to officers because even if you're –

even if you jump out of the car and the officers clap you in irons and throw you in the police car and whisk you off to the station, and you conduct the investigation within a minute of this happening, you have no exigency and there is no reason to conduct a search without a warrant. If they don't have exigency and they don't have probable cause, then they're going to need a warrant. That's really what it comes down to, and obviously the court is going to read, and *Dean* is very instructive.

THE COURT: Thank you.

I commend you for the arguments. This is one of the better arguments I've heard. I appreciate that. Yes, I'm going to read. I'll read all the cases and I want to go over my notes from last time and everything.

And I'll take the matter under advisement. I'll try to decide as soon as possible.

Is there any reason we need to have any status [48] conference or anything at all?

MR. JACOBS: I don't think so, Your Honor. You know that the defendant served the sentence that was previously imposed in this case. So he's held on another matter that he's serving. He's almost done with that case. I think he's done in March of next year so –

THE COURT: I'll get this out long before March of next year.

MR. JACOBS: Very well.

THE COURT: Thank you very much.

MR. DIEBOLT: Thank you.

MR. JACOBS: Thank you.

(The Court stood at recess.)

* * *

[49] **CERTIFICATE**

I, Gay M. Kelley, hereby certify that as an Official Court Reporter in the Superior Court of Pima County, Arizona, I was at the hearing of the foregoing entitled case; that while there I took down in stenotype all the oral testimony adduced and/or proceedings; I have transcribed such stenotype into typewriting; and that the foregoing typewritten matter contains a full, true and correct transcript of my stenotype notes so taken by me as aforesaid, to the best of my skill and ability.

Gay M. Kelley, RPR
Official Court Reporter.
Certified Court Reporter
#50287

ARIZONA SUPERIOR COURT, PIMA COUNTY

CASE NO. **CR-20000042**

DATE: December 7, 2004

JUDGE PRO TEMPORE:
HON. BARBARA SATTLER

COURT REPORTER:
NONE

STATE OF ARIZONA

VS.

RODNEY JOSEPH GANT

RULING

(Filed Dec. 8, 2004)

UNDER ADVISEMENT RULING: EVIDENTIARY HEARING

PROCEDURAL HISTORY

Before Defendant's trial, a motion to suppress was heard regarding cocaine uncovered during a search of his vehicle after arrest. The motion was denied and Defendant was convicted following a trial of unlawful possession of a narcotic drug for sale and unlawful possession of drug paraphernalia. He was sentenced to mitigated, concurrent terms, which resulted in a term of imprisonment for three years.

Defendant appealed the motion to suppress decision and the Arizona Court of Appeals ruled the trial court improperly denied Defendant's motion. The Arizona State Supreme Court denied the State's petition on the issue and a mandate issued on October 23,

2002. On December 10, 2002, the trial court allowed the State, pursuant to *State v. Million,* 120 Ariz. 10, 588 P.2d 897 (1978), to dismiss the charges against Defendant without prejudice while it pursued an appeal of the adverse suppression ruling.

The US Supreme Court granted the State's petition for certiorari on April 21, 2003. *Arizona v. Gant,* 538 US 976, 123 S.Ct. 1784, 155 L.Ed.2d 664 (2002). Oral argument was set for November of 2003. Pending argument, the Arizona Supreme Court decided *State v. Dean,* 206 Ariz. 158, 76 P.3d 429 (2003) which rejected the Arizona Court of Appeals reasoning in this matter. The scheduled argument in November was vacated by the US Supreme Court and remanded to the Arizona Court of Appeals for reconsideration in light of the *Dean* case. The Arizona Court of Appeals held that the trial court's decision to allow the lawyers to stipulate to a summary of the facts at the motion hearing left an inadequate record of the facts as they related to the two primary issues in *Dean* in determining whether Defendant was a "recent occupant" of the vehicle: proximity to the vehicle when arrested and length of time between when Defendant got out of the vehicle and was arrested.

The matter was remanded to this court to hold an evidentiary hearing and make factual findings pursuant to the *Dean* issues. That hearing was heard on November 1 and 9, 2004. The factual record from that hearing is as follows:

FACTS

On the afternoon of August 25, 1999, Officer Griffith knocked on the door of a house on Walnut Street that was under suspicion of being involved in narcotics activity. Defendant answered the door and told the Officer the female owner of the home was not present. He provided the officer information pertaining to his identity. Later in the day, the officer ran Defendant's name to find out he had an outstanding warrant for driving on a suspended license.

That night, officers went back to the house and approached a subject, Jackie White, in the backyard. Mr. White stated he was waiting for a friend. Mr. White was eventually arrested. Shortly after contact with him was made, a female subject pulled in front of the house and contact was made with her. She was ultimately arrested for providing false information to the police. Drugs were found during a search of her person incident to arrest.

While the two aforementioned subjects were handcuffed and placed in police vehicles, Defendant pulled into the driveway in a white car officers recognized from earlier in the day. Officer Griffith made verbal contact with Defendant immediately after he exited the vehicle. Defendant and the officer stood approximately ten feet from each other, and each traveled about the half that distance each to meet in the middle. Defendant was told he was under arrest for driving with a suspended license and instructed him to turn around to be cuffed. Defendant complied

and was taken into custody. The police then searched his car and discovered cocaine and drug paraphernalia.

ANALYSIS

The US Supreme Court holds that a warrantless search may be made incident to arrest, for either officer safety concerns or preservation of evidence concerns, of the arrestee's person and the area "within his immediate control." *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). This area has been construed to mean the area from within which the arrestee could gain possession of a weapon or destructible evidence. *Id.* Further, the US Supreme Court has held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as contemporaneous incident of that arrest, search the passenger compartment of that automobile" and any containers found therein. *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). *Belton* defined the spatial scope of the search that could be conducted, but failed to elaborate on what it meant to be a "recent occupant" of a vehicle. The Arizona Supreme Court tackled this issue in *Dean.*

In *Dean,* the issue was whether a search of an automobile is incident to the arrest of a Defendant. The Defendant in that matter was arrested in a house, approximately 2.5 hours after he had exited his vehicle. The Court held that a warrantless search

of an automobile's passenger compartment is allowed when the Defendant is a "recent occupant" of the vehicle, meaning he is arrested in close proximity to the automobile immediately after he exits it. The Court found the 2.5 hour delay between the time Defendant exited his vehicle and when he was arrested did not fall within the Fourth Amendment's "search incident to arrest" exception.

Dean reiterates one of the two key issues in these kinds of situation: "[A] search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest" *Stoner v. California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d. 856 (1964). This is one of the two main requirements of the recent occupancy test at issue here. To be a recent occupant, the arrestee must have been arrested "in close proximity to the vehicle immediately after the [defendant] exits the automobile." *Dean,* quoting *Glasco v. Commonwealth,* 257 Va. 433, 513 S.E.2d 137 (1999). Hence, there is a spatial and time element to the test.

Dean instructs that in determining whether a search was "substantially contemporaneous" with an arrest of a recent occupant of a vehicle will depend on the facts of each case, noting many cases that have come to various conclusions. *Dean* did not elaborate further, holding that under no reasonable analysis could the facts in that case fit within what was needed for a valid search considering both the distance from the vehicle and the huge lapse of time

between when the Defendant exited the vehicle and when he was arrested.

Regarding the "substantially contemporaneous" issue, the 9th Circuit provides some guidance in *United States v. Vasey,* 834 F.2d 782 (9th Cir. 1987). In that case, Defendant was arrested after being pulled over on the basis of an outstanding warrant. The police searched the vehicle some 35-40 minutes after Defendant, the lone occupant of the vehicle, was handcuffed and put in a patrol car. The Court found this was too long and not contemporaneous enough to justify a warrantless search incident to arrest. The court noted:

> "Simply because the officers had the right to enter the vehicle during or immediately after the arrest, a continuing right was not established to enter the vehicle without a warrant. We do not hold that once an arrestee was handcuffed, all rights to search the vehicle vanish. Rather, the circumstances of the arrest dictate whether the search was proper and conducted contemporaneously after the arrest."

In this *case,* the Defendant was arrested and handcuffed and his vehicle was searched almost immediately after he was placed in a patrol car. Hence, it appears the first requirement of the recent occupancy test is met as the search was conducted immediately after arrest.

The issue of proximity is next. *Dean* requires the arrestee to be within close proximity of the vehicle at

the time of the arrest to be a recent occupant. Police contact need not have been made with the driver before he exits the car. *Thornton v. U.S.*, 124 S.Ct. 2127 (US 2004). In this case, verbal police contact was made immediately after the Defendant got out of the car and he was arrested seconds later when he walked a few feet to meet the officers. When arrested, Defendant was apparently at most 8-10 feet from the car. This would surely constitue "close proximity" and meet this prong of the recent occupancy test.

CONCLUSION

The search in this matter is a valid warrantless search incident to arrest.

IT IS THEREFORE ORDERED that the Motion to Suppress is DENIED.

cc: County Attorney – Mark T. Dieboldt
Thomas Jacobs, Esq.
Under Advisement Clerk

Gerald Bradley
Law Clerk

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA, Appellee, v. RODNEY JOSEPH GANT, Appellant.	Arizona Supreme Court No. Cr-06-0385-PR Court of Appeals Division Two No. 2 CA-CR 00-0430 Pima County Superior Court No. CR-20000042 **OPINION** (Filed Jul. 25, 2007)

Appeal from the Superior Court in Pima County
The Honorable Barbara C. Sattler, Judge Pro Tempore

REVERSED

Opinion of the Court of Appeals, Division Two
213 Ariz. 446, 143 P.3d 379 (2006)

JUDGMENT AFFIRMED; OPINION VACATED

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BERCH, Vice Chief Justice.

¶ 1 This case requires us to determine whether the search incident to arrest exception to the Fourth Amendment's warrant requirement permits the warrantless search of an arrestee's car when the scene is secure and the arrestee is handcuffed, seated in the back of a patrol car, and under the supervision of a police officer. We hold that in such circumstances, a warrantless search is not justified.

I. FACTS AND PROCEDURAL BACKGROUND

¶ 2 On August 25, 1999, two uniformed Tucson police officers went to a house after receiving a tip of narcotics activity there. When Defendant Rodney

Gant answered the door, the officers asked to speak with the owner of the residence. Gant informed the officers that the owner was not home, but would return later that afternoon. After leaving the residence, the officers ran a records check and discovered that Gant had a suspended driver's license and an outstanding warrant for driving with a suspended license.

¶ 3 The officers returned to the house later that evening. While they were there, Gant drove up and parked his car in the driveway. As he got out of his car, an officer summoned him. Gant walked eight to twelve feet toward the officer, who immediately arrested and handcuffed him. Within minutes, Gant had been locked in the back of a patrol car, where he remained under the supervision of an officer. At least four officers were at the residence by this time and the scene was secure. Two other arrestees had already been handcuffed and locked in the back of separate patrol cars and there were no other people around.

¶ 4 After Gant had been locked in the patrol car, two officers searched the passenger compartment of his car and found a weapon and a plastic baggie containing cocaine. Gant was charged with one count of possession of a narcotic drug for sale and one count of possession of drug paraphernalia for the baggie that held the drug.

¶ 5 Gant filed a motion to suppress the evidence seized from his car, which the superior court denied.

Gant was convicted of both charges and appealed. The court of appeals held that the evidence should have been suppressed and therefore reversed Gant's convictions. *State v. Gant,* 202 Ariz. 240, 246, ¶ 18, 43 P.3d 188, 194 (App. 2002). After this Court denied review, the State petitioned the United States Supreme Court for certiorari. The Supreme Court granted the petition, vacated the court of appeals' opinion, and remanded to that court to reconsider its opinion in light of this Court's opinion in *State v. Dean,* 206 Ariz. 158, 76 P.3d 429 (2003). *Arizona v. Gant,* 540 U.S. 963 (2003). In *Dean,* we held that when an arrestee is not a recent occupant of his vehicle at the time of the arrest, the reasons supporting a "warrantless search of the vehicle-protection of the arresting officers and preservation of evidence" – no longer justify the search and therefore the police must obtain a warrant. 206 Ariz. at 166, ¶¶ 32-34, 76 P.3d at 437.

¶ 6 Following the Supreme Court's remand, the court of appeals remanded Gant's case to the trial court to determine whether Gant was a recent occupant of his car when he was arrested. After an evidentiary hearing, the superior court determined that Gant was a recent occupant and concluded that the search of his car was thus justified as incident to his arrest. Gant appealed and the court of appeals again reversed, finding that the search of Gant's car was not incident to his arrest because it was not contemporaneous with his arrest and did not satisfy the rationales set forth in *Chimel v. California,* 395 U.S.

752 (1969), for dispensing with the warrant requirement. *State v. Gant,* 213 Ariz. 446, 452, ¶ 18, 143 P.3d 379, 385 (App. 2006).

¶ 7 The State petitioned for review, which we granted because this case presents an important question regarding vehicle searches incident to arrest. We have jurisdiction pursuant to Article 6, Section 5(3), of the Arizona Constitution, Arizona Revised Statutes ("A.R.S.") section 13-4032(3) (2001), and Arizona Rule of Criminal Procedure 31.19.

II. DISCUSSION

¶ 8 The Fourth Amendment guarantees the right of citizens to be free from unreasonable governmental searches. U.S. Const. amend. IV; *see also Terry v. Ohio,* 392 U.S. 1, 9 (1968).[1] "[S]ubject only to a few specifically established and well-delineated exceptions," a search is presumed to be unreasonable under the Fourth Amendment if it is not supported by probable cause and conducted pursuant to a valid search warrant. *Katz v. United States,* 389 U.S. 347, 357 (1967).

¶ 9 The Supreme Court has recognized a "search incident to a lawful arrest" as one of the exceptions to the Fourth Amendment's warrant requirement. *See,*

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[1] Gant does not claim a violation of the Arizona Constitution. We therefore consider only whether the search violated the Fourth Amendment.

e.g., Chimel, 395 U.S. at 755. The Court justified the search incident to arrest exception by the need to protect officers and preserve evidence:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.

Id. at 762-63. Based on the rationales of officer safety and preservation of evidence, the Court limited the permissible scope of a search incident to arrest to the "arrestee's person and the area 'within his immediate control'" – that is, "the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763.

¶ 10 Although the rule has worked reasonably well in some contexts, it has proved difficult to apply to automobile searches incident to arrest, prompting the Supreme Court to reconsider and redefine the

permissible scope of such a search. *See New York v. Belton,* 453 U.S. 454, 455 (1981). In *Belton,* a police officer stopped a speeding vehicle and made contact with the driver and three passengers while all occupants were seated in the vehicle. *Id.* at 455-56. Upon smelling marijuana, the officer ordered the occupants out of the car, arrested them, and searched each one. *Id.* at 456. As the driver and passengers stood by, the officer searched the car's passenger compartment and found a jacket containing cocaine. *Id.*

¶ 11 The sole question before the Court in *Belton* was the "constitutionally permissible scope" of an otherwise lawful search of an automobile incident to arrest, given the exigencies of the arrest situation. *Id.* at 455, 457; *see also Thornton v. United States,* 541 U.S. 615, 619 (2004) (describing *Belton* as deciding "the constitutionally permissible scope of a search" incident to arrest). Noting the lack of consistency among courts in deciding how much of the automobile the police could search incident to arrest and the desirability of a bright-line rule to guide police officers in the conduct of their duties, the Supreme Court held that the area within an arrestee's immediate control encompassed not only "the passenger compartment of an automobile" that the arrestee recently occupied, but also containers within the passenger compartment. *Belton,* 453 U.S. at 458-60.

¶ 12 The State and our dissenting colleagues seek to bring Gant's case within the *Belton* rule. Unlike *Belton,* however, this case deals not with the permissible scope of the search of an automobile, but with the threshold question whether the police may conduct a search

incident to arrest at all once the scene is secure. Because *Belton* does not purport to address this question, we must determine whether officer safety or the preservation of evidence, the rationales that excuse the warrant requirement for searches incident to arrest, justified the warrantless search of Gant's car. *Cf. Dean*, 206 Ariz. at 166, ¶¶ 32-34, 76 P.3d at 437 (relying on *Chimel* rationales in holding that arrestee was not a recent occupant of vehicle).

¶ 13 Neither rationale supports the search here. At the time of the search, Gant was handcuffed, seated in the back of a locked patrol car, and under the supervision of a police officer. The other two arrestees at the scene were also handcuffed and detained in the back of patrol cars, and the record reflects no unsecured civilians in the vicinity. At least four officers were on the scene. At that point, the police had no reason to believe that anyone at the scene could have gained access to Gant's vehicle or that the officers' safety was at risk. Indeed, one of the officers who searched Gant's car acknowledged at the evidentiary hearing that the scene was secure at the time of the search. Therefore neither a concern for officer safety nor the preservation of evidence justified the warrantless search of Gant's car. Absent either of these *Chimel* rationales, the search cannot be upheld as a lawful search incident to arrest.[2]

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[2] We agree with Justice Scalia's statement that applying the *Belton* doctrine to justify a search of the car of a person handcuffed

(Continued on following page)

¶ 14 Nor does this case require this Court to "reconsider *Belton.*" *See* Dissent ¶ 27. *Belton* dealt with a markedly different set of circumstances from those present in this case. The four unsecured occupants of the vehicle in *Belton* presented an immediate risk of loss of evidence and an obvious threat to the lone officer's safety that are not present in Gant's case. *See Belton,* 453 U.S. at 455-56. Thus, in *Belton, Chimel's* justifications were satisfied and the search was "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* at 457, 101 S.Ct. 2860 (quoting *Terry,* 392 U.S. at 19). Here, to the contrary, because Gant and the other two arrestees were all secured at the time of the search and at least four officers were present, no exigencies existed to justify the vehicle search at its inception. *Belton* therefore does not support a warrantless search on the facts of this case.

¶ 15 It is possible to read *Belton,* as the State and the Dissent do, as holding that because the interior of a car is generally within the reach of a recent occupant, the *Belton* bright-line rule eliminates the requirement that the police assess the exigencies of the situation. But, if no exigency must justify the warrantless search, it would seem to follow that a warrantless search incident to an arrest could be conducted hours after the arrest and at a time when

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and confined in a police car "stretches [the doctrine] beyond its breaking point." *Thornton,* 541 U.S. at 625 (Scalia, J., concurring in the judgment).

the arrestee had already been transported to the police station. Yet the Court was careful in *Belton* to distinguish *United States v. Chadwick,* 433 U.S. 1, 15 (1977), *overruled on other grounds by California v. Acevedo,* 500 U.S. 565 (1991), in which it had rejected an argument that a search of a footlocker more than an hour after the defendants' arrests could be justified as incidental to the arrest. In doing so, the Court noted that the search occurred "after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency." *Belton,* 453 U.S. at 462 (quoting *Chadwick,* 433 U.S. at 15). Such a distinction would be wholly unnecessary under the State's interpretation of *Belton.*

¶ 16 Relying on language in *United States v. Robinson,* 414 U.S. 218 (1973), the State next maintains that the *Chimel* justifications are presumed to exist in all arrest situations simply by "the fact of the lawful arrest," *id.* at 235 and so it need not show that either *Chimel* rationale existed at the time of the search.

¶ 17 But *Robinson* does not hold that *every* search following an arrest is excepted from the Fourth Amendment's warrant requirement; if it did, the Court's opinions in the cases following *Chimel* would hardly have been necessary. Rather, *Robinson* teaches that the police may search incident to an arrest without proving in any particular case that they were concerned about their safety or the destruction of

evidence; these concerns are assumed to be present in every arrest situation. Once those concerns are no longer present, however, the "justifications [underlying the exception] are absent" and a warrant is required to search. *Preston v. United States,* 376 U.S. 364, 367-68 (1964); *accord Chambers v. Maroney,* 399 U.S. 42, 47 (1970) ("[T]he reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house."); *see also Chadwick,* 433 U.S. at 15. Similarly, when, as here, the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer, the warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence.

¶ 18 The State also argues that the Supreme Court's recent decision in *Thornton,* 541 U.S. 615, compels a contrary result. In *Thornton,* an officer in an unmarked patrol car ran a check on the license plate of a suspicious car and discovered that the plate was not registered to that car. *Id.* at 617-18. Before the officer could pull the car over, Thornton parked and alighted from the car. *Id.* at 618. The officer parked his patrol car behind Thornton's car, exited, and approached him. *Id.* Thornton agreed to a pat down search, during which the officer felt a bulge in Thornton's pocket. *Id.* Thornton admitted possessing drugs and produced bags containing marijuana and

crack cocaine. *Id.* The officer arrested and handcuffed Thornton and placed him in the back of the patrol car. *Id.* The officer then searched Thornton's car and found a gun. *Id.*

¶ 19 Although the facts in *Thornton* resemble those in the case before us, the case is distinguishable. Thornton never claimed that being placed in the patrol car removed the *Chimel* justifications for the search; rather, he challenged the lawfulness of the search of his car on the ground that he was out of his car before his encounter with the police began. *Id.* at 619. Thus the Supreme Court's opinion addressed only whether the *Belton* rule applies when an officer does not initiate contact with a vehicle's occupant until after the occupant has left the vehicle. *Id.* at 617, 622 n. 2 (declining to address question on which Court did not grant review), 624 n.4 (plurality declining to address questions other than "whether the [*Belton* rule] is confined to situations in which the police initiate contact with the occupant of a vehicle while that person is in the vehicle"). The answer to that question turned on whether, having stepped out of his car, Thornton was a recent occupant for purposes of *Belton* when he was arrested. *See id.* at 622-24. The Supreme Court concluded that he was:

> [W]hile an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at

> the moment that the officer first initiated contact with him.

Id. at 622 (footnote omitted).[3]

¶ 20 Because *Thornton's* holding was carefully limited to the question presented, the Supreme Court did not address whether, even if an arrestee is a recent occupant, a search of the arrestee's vehicle is nonetheless unlawful if concerns for officer safety or destruction of evidence – the *Chimel* justifications – no longer exist at the time of the search. *See id.* at 622 n.2, 624 n.4.

¶ 21 We are aware that most other courts presented with similar factual situations have found *Belton* and *Thornton* dispositive of the question whether a search like the one at issue was incident to arrest. *E.g., United States v. Mapp,* 476 F.3d 1012, 1014-15, 1019 (D.C. Cir.) (upholding search of arrestee's car conducted after he had been handcuffed and placed in patrol car), *cert. denied,* 75 U.S.L.W. 3695 (Jun. 25, 2007); *United States v. Hrasky,* 453 F.3d 1099, 1100, 1103 (8th Cir. 2006) (same), *cert. denied,* 127 S. Ct. 2098 (2007); *United States v. Osife,* 398 F.3d 1143, 1144, 1146 (9th Cir. 2005) (same); *accord State v. Waller,* 918 So. 2d 363, 364, 366-68 (Fla. Dist. Ct. App. 2005) (upholding search of arrestee's truck conducted

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[3] Gant concedes that he was a recent occupant of his car at the time he was arrested, a concession borne out by the facts: Gant was arrested immediately after alighting from his car and within eight to twelve feet of it. *See Thornton,* 541 U.S. at 622; *Dean,* 206 Ariz. at 166, ¶ 30, 76 P.3d at 437.

after he was handcuffed and "secured at the back of the truck"); *Rainey v. Commonwealth,* 197 S.W.3d 89, 91, 95 (Ky. 2006) (upholding search of arrestee's car conducted after he was handcuffed and "so far from his vehicle that it was unlikely he could have accessed it"), *cert. denied,* 127 S.Ct. 1005 (2007); *State v. Scott,* 200 S.W.3d 41, 43-44 (Mo. Ct. App. 2006) (upholding search of arrestee's car conducted after he had been handcuffed and placed in patrol car); *see also Thornton,* 541 U.S. at 628 (Scalia, J., concurring in the judgment, citing cases upholding searches conducted after arrestee had been handcuffed and secured in patrol car). We do not, however, read *Belton* or *Thornton* as abandoning the *Chimel* justifications for the search incident to arrest exception. *See Thornton,* 541 U.S. at 621 ("In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle."); *Belton,* 453 U.S. at 460 n.3 ("Our holding today does no more than determine the meaning of *Chimel's* principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests."). Because neither *Belton* nor *Thornton* addresses the precise question presented here, we must, if we are to maintain our constitutional

moorings, rely on *Chimel's* rationales in reaching our holding.[4]

¶ 22 Amici Arizona Law Enforcement Legal Advisors' Association and Arizona Association of Chiefs of Police assert that, as a result of our holding, police officers will not secure arrestees until after they have searched the passenger compartment of an arrestee's vehicle, thus jeopardizing the officers' safety. We presume that police officers will exercise proper judgment in their contacts with arrestees and will not engage in conduct that creates unnecessary risks to their safety or public safety in order to circumvent the Fourth Amendment's warrant requirement. In this technological age, when warrants can be obtained within minutes, it is not unreasonable to require that police officers obtain search warrants when they have probable cause to do so to protect a citizen's right to be free from unreasonable governmental searches.

¶ 23 We recognize the importance of providing consistent and workable rules to guide police officers in making decisions in the field. *Belton* sought to address this concern by creating a bright-line rule

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[4] Other courts have followed this approach as well. *See Ferrell v. State*, 649 So.2d 831, 833 (Miss. 1995) (holding that search of arrestee's car conducted after he had been handcuffed and placed in patrol car did not fall within search incident to arrest exception because the rationales underlying the exception were absent); *State v. Greenwald*, 858 P.2d 36, 37 (Nev. 1993) (same, citing *Chimel*).

regarding the scope of automobile searches incident to arrest. The Supreme Court has not, however, adopted a bright-line rule for determining whether a warrantless search of an automobile is justified to begin with. In the absence of such a rule, we look to the circumstances attending the search to determine whether a warrant was required. *See Dean,* 206 Ariz. at 166, ¶ 34, 76 P.3d at 437 (examining "the totality of the facts" in determining the necessity for a warrant).[5] When, based on the totality of the circumstances, an arrestee is secured and thus presents no

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[5] The Dissent suggests that the majority opinion departs from a "'straightforward rule' that does not depend on case-by-case adjudication." Dissent ¶ 39. But our dissenting colleagues concede that a *Belton* search is proper only if it is "a contemporaneous incident" of the arrest. *Id.* ¶ 38. Determining whether the search is a contemporaneous incident, however, requires the very case-by-case examination of the facts that the Dissent criticizes. *See Preston,* 376 U.S. at 367. Indeed, *Thornton* teaches that a determination that the defendant was a recent occupant of the searched vehicle must also occur before the *Belton* rule regarding the permissible scope of a search applies. 541 U.S. at 622. Thus, this opinion does not eviscerate any existing bright-line rule; it merely inquires whether an exigency remains to justify the search when the defendant is locked in a police car, just as the Dissent would ask whether the search was reasonably contemporaneous to the arrest, and as the Court in *Thornton* inquired to determine whether the defendant was so recent an occupant as to present the threat of destruction of evidence or access to a weapon. If the exigency justifying a search incident to arrest disappears when the search is not proximate in time to the arrest (or when the arrestee is not a recent occupant of the car), it follows that the justifying exigency would also disappear once the arrestee no longer has any possible access to evidence or weapons.

reasonable risk to officer safety or the preservation of evidence, a search warrant must be obtained unless some other exception to the warrant requirement applies.

¶ 24 The State has advanced no alternative theories justifying the warrantless search of Gant's car, and we note that no other exception to the warrant requirement appears to apply. The officers did not have probable cause to search Gant's car for contraband, as is required by the automobile exception. *See Chambers,* 399 U.S. at 51-52. No evidence or contraband was in plain view. *See Coolidge v. New Hampshire,* 403 U.S. 443, 465 (1971) (plurality opinion). Moreover, the officers testified that they had no intention of impounding Gant's car until after they searched the passenger compartment and found the contraband. Thus the search cannot be characterized as an inventory search. *See South Dakota v. Opperman,* 428 U.S. 364, 372 (1976). There being no other exception to the warrant requirement justifying the search of Gant's car, the warrantless search was unlawful.

III. CONCLUSION

¶ 25 For the foregoing reasons, we hold that the warrantless search of Gant's car was not justified by the search incident to arrest exception to the Fourth Amendment's warrant requirement. The evidence obtained as a result of the unlawful search must therefore be suppressed. We reverse the judgment of

the superior court and affirm the judgment of the court of appeals suppressing the evidence, but vacate the opinion of the court of appeals.

Rebecca White Berch,
Vice Chief Justice

CONCURRING:

Michael D. Ryan, Justice

Andrew D. Hurwitz, Justice

BALES, Justice, dissenting.

¶ 26 Police officers immediately confronted Gant when he drove up and got out of his car; within minutes, they arrested him, placed him in handcuffs, and locked him in a patrol car; they then promptly searched his car, where they found a pistol and a bag of cocaine. The majority holds that the warrantless search cannot be justified as incident to Gant's arrest because, at the time of the search, there were no exigent concerns for either officer safety or the preservation of evidence. *See* Op. ¶¶ 13, 20.

¶ 27 Because I believe that the majority's reasoning and conclusion are inconsistent with the Supreme Court's decision in *New York v. Belton,* 453 U.S. 454 (1981), I respectfully dissent. Although there may be good reasons to reconsider *Belton,* doing so is the sole

prerogative of the Supreme Court, even if later developments have called into question the rationale for its decision. *See State Oil Co. v. Khan,* 522 U.S. 3, 20 (1997).

¶ 28 *Belton* itself was an extension of the Court's holdings in *Chimel v. California,* 395 U.S. 752 (1969), and *United States v. Robinson,* 414 U.S. 218 (1973). In *Chimel,* the Court held that, incident to a lawful arrest, police may properly search the arrestee and the area within the arrestee's "immediate control" without a warrant. 395 U.S. at 763. Although "*Chimel* searches" are justified by general concerns for officer safety and the preservation of evidence, *see id.,* in *Robinson* the Court held that such searches are permissible regardless of whether, in the circumstances of a particular case, "there was present one of the reasons supporting the" exception to the warrant requirement, 414 U.S. at 235.

¶ 29 The Court in *Belton* considered the application of *Chimel* and *Robinson* when police arrest an occupant or recent occupant of an automobile. There, an officer stopped a car and, having reason to believe the occupants unlawfully possessed marijuana, ordered the driver and his three companions out of the car and placed them under arrest. 453 U.S. at 455-56. After searching each individual, the officer then searched the car's passenger compartment, where he discovered a jacket on the back seat. *Id.* at 456. He opened one of the jacket pockets and found cocaine. *Id.*

¶ 30 *Belton* upheld the officer's search of the jacket as a valid search incident to arrest even though it occurred after the defendant had been removed from the car and could not reach the jacket. *Id.* at 462-63. The Court first extended the *Chimel* exception to the passenger area of a car by adopting the "generalization" that an arrestee might reach within this area to grab a weapon or destroy evidence. *Id.* at 460. Having defined the area of the suspect's "immediate control" to include the passenger compartment, the Court went on to hold that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment" and "the contents of any containers found within." *Id.* (footnote omitted).

¶ 31 The search authorized by *Belton* does not depend on a case-specific determination that there may be weapons or evidence in the automobile. Indeed, the Court noted that its holding would allow searches of containers that "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." *Id.* at 461. The Court nonetheless concluded that the lawful arrest itself justified the search. Quoting *Robinson,* the Court noted that "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would . . . be found." *Id.*

¶ 32 In holding that the search of Gant's automobile violated the Fourth Amendment, the majority's analysis conflicts with *Belton* in three respects. The majority concludes that the search was not incident to Gant's arrest because the *Chimel* concerns for officer safety and preservation of evidence were not present. *See* Op. ¶ 13 ("Absent either of these *Chimel* rationales, the search cannot be upheld as a lawful search incident to arrest.").

¶ 33 The validity of a *Belton* search, however, clearly does not depend on the presence of the *Chimel* rationales in a particular case. Indeed, in *Belton,* the New York Court of Appeals, much like the majority here, held that the search could "not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article." 453 U.S. at 456 (quoting *People v. Belton,* 407 N.E.2d 420, 421 (N.Y. 1980)). In reversing the state court and upholding the search, the Court in *Belton* did not question the state court's finding that the jacket was inaccessible. Justice Brennan, dissenting in *Belton,* pointedly noted that "the Court today substantially expands the permissible scope of searches incident to arrest by permitting police officers to search areas and containers the arrestee could not possibly reach at the time of arrest." *Id.* at 466.

¶ 34 Justice Brennan explicitly made the argument that the majority adopts here. "When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying

Chimel's limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband." *Id.* at 465-66. While these observations have force, if they did not persuade a majority of the Supreme Court in *Belton,* I do not think it is appropriate for our Court to effectively rewrite *Belton* as embracing them now.

¶ 35 *Belton* is also inconsistent with the majority's focus on the *Chimel* rationales at the time of the *search. See* Op. ¶¶ 13-14. In *Belton* itself the search did not take place until after the officer had already removed the defendant from the car. 453 U.S. at 456. The Court did not consider whether one of the *Chimel* rationales was present at the time of the search; instead, the Court noted that the search was justified by the arrest itself. *Id.* at 461. That the jacket was within the passenger compartment in which Belton "had been a passenger just before he was *arrested,*" meant that it was within his "immediate control" for purposes of the search incident to arrest. *Id.* at 462 (emphasis added).

¶ 36 Because a *Belton* search is justified by circumstances that the Supreme Court thought generally exist upon the arrest of the occupant of a vehicle, the validity of the search does not depend on particularized concerns for officer safety or preservation of evidence at the time of the search. Thus, *Belton* rejected the argument that the search of the jacket in that case was improper because it did not occur until after the officer had reduced it to his "exclusive

control." *Id.* at 461 n.5. Recognizing the implications of the Court's reasoning, Justice Brennan noted, "Under the approach taken today, the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car before placing them under arrest. . . ." *Id.* at 468.

¶ 37 The point noted by Justice Brennan in his dissent has been recognized by nearly every appellate court that has since considered the issue: *Belton* implies that warrantless searches may be conducted even when the arrestee has been handcuffed and locked in a patrol car. *See, e.g., United States v. Hrasky,* 453 F.3d 1099, 1101 (8th Cir. 2006) (stating that the incapacitation of the arrestee does not invalidate a subsequent search incident to arrest under *Belton), cert. denied,* 127 S.Ct. 2098 (2007); *United States v. Weaver,* 433 F.3d 1104, 1107 (9th Cir.) (concluding that *Belton* controls where the arrestee is handcuffed and locked in a patrol car), *cert. denied,* 126 S. Ct. 2053 (2006); *United States v. Wesley,* 293 F.3d 541, 547-49 (D.C. Cir. 2002) (same); *United States v. Humphrey,* 208 F.3d 1190, 1202 (10th Cir. 2000) (same); 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.1(c), at 517 & n.89 (4th ed. 2004) (listing cases).

¶ 38 That the *Chimel* rationales need not be present in a particular case does not, as the majority contends, mean that police may conduct warrantless searches hours after an arrest. *See* Op. ¶ 15. *Belton* upheld the warrantless search of a vehicle's passenger compartment "as a *contemporaneous incident*" of

the occupant's arrest. 453 U.S. at 460 (emphasis added). In so ruling, the Court distinguished *United States v. Chadwick,* 433 U.S. 1 (1977), as not involving a search incident to an arrest, *see* 453 U.S. at 461-62. The post-arrest search in *Belton* was justified because it was incidental to the arrest, not because other exigencies were present that were absent in *Chadwick.* Thus, although *Belton* does not require a warrantless search to occur simultaneously with the arrest, it must occur within some temporal proximity. *See Hrasky,* 453 F.3d at 1101 (discussing decisions requiring search to occur "roughly contemporaneous with the arrest" or within a "reasonable time" after police obtain control of the vehicle); *United States v. Butler,* 904 F.2d 1482, 1484 (10th Cir. 1990) (concluding that search of item found in vehicle at police station not contemporaneous with arrest); *State v. Smith,* 813 P.2d 888, 891 (Idaho 1991) (stating that half hour delay between arrest and search permissible); *State v. Kunkel,* 455 N.W.2d 208, 210 (N.D. 1990) (concluding that search at police station not contemporaneous with earlier arrest).

¶ 39 The majority also departs from *Belton's* determination that searches in this context should be guided by a "straightforward rule" that does not depend on case-by-case adjudication. *See* 453 U.S. at 458-59. The majority concludes that a *Belton* search is not justified unless, "based on the totality of the circumstances," there is a "reasonable risk to officer safety or the preservation of evidence." Op. ¶ 23. Such an inquiry can only be made on a case-specific basis,

initially by officers in the field and, if a search is later challenged, post hoc by reviewing courts. This approach is at odds with the core premise of *Belton*. *See Thornton v. United States*, 541 U.S. 615, 622-23 (2004) ("The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated.").[6]

¶ 40 The bright-line rule embraced in *Belton* has long been criticized and probably merits reconsideration. *Belton* created a significant exception to the Fourth Amendment's warrant requirement by making a generalization about the exigencies of arrests involving automobiles and then allowing searches whether or not the concerns justifying the exception were present in any particular case. *Belton* thus rests

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[6] *Belton* itself does not completely avoid the need for case-by-case inquiry, inasmuch as the Court limited the exception to searches that are the contemporaneous incident of the arrest of a vehicle's occupant or recent occupant. Justice Brennan made this very point in his dissent. *See* 453 U.S. at 469-71. But this does not imply, as the majority contends, ¶ 23 n. 5, that *Belton's* application should turn on a case-specific finding of exigent circumstances at the time of the search. Nor does *Thornton* suggest that a case-specific assessment of exigent circumstances should determine whether an arrestee is a "recent occupant" for purposes of the *Belton* exception. *See* 541 U.S. at 623 (refusing to limit *Belton* to searches in which police initiate contact with suspect as it would involve "inherently subjective" and "highly fact specific" determinations that *Belton* sought to avoid).

on a "shaky foundation," *id.* at 624 (O'Connor, J., concurring in part), that has become even more tenuous over time. Police officers routinely secure suspects by handcuffing them before conducting *Belton* searches. *Id.* at 628 (Scalia, J., joined by Ginsburg, J., concurring in the judgment) (noting that "[i]f it was ever true that" arrestees generally have access to passenger compartments, "it certainly is not true today"). *See generally* David S. Rudstein, Belton *Redux: Reevaluating* Belton's *Per Se Rule Governing the Search of an Automobile Incident to an Arrest,* 40 Wake Forest L.Rev. 1287, 1333-34 (2005) (discussing police practices).

¶ 41 But even if *Belton* were to be reconsidered, the approach adopted by the majority is only one of several possible alternatives. *See id.* at 1338-59. Although the majority revives a case-by-case approach focusing on the presence of the *Chimel* rationales at the time of the search, it would also be possible to imagine a bright-line limitation to *Belton's* bright-line exception. For example, one could argue that a *Belton* search is never justified as "incident to arrest" if it occurs after a suspect is handcuffed outside the vehicle. Or perhaps *Belton* should be limited so it continues to allow searches of the passenger compartment but not containers found therein, *see Thornton,* 541 U.S. at 634 (Stevens, J., joined by Souter, J., dissenting), or even replaced by a rule "built on firmer ground," *id.* at 625 (O'Connor, J., concurring in part), that would allow warrantless searches when "it is reasonable to believe evidence

relevant to the crime of arrest might be found in the vehicle," *id.* at 632 (Scalia, J., joined by Ginsburg, J., concurring in the judgment).

¶ 42 If Gant had developed an argument under Article 2, Section 8, of the Arizona Constitution, we might properly have considered whether, as a matter of state law, to reject or modify the *Belton* rule. Several other state courts have done so. *See, e.g., State v. Eckel,* 888 A.2d 1266, 1275-77 (N.J. 2006) (rejecting *Belton* rule under state constitution); *State v. Bauder,* 924 A.2d 38, 46 ¶ 19 (Vt. 2007) (describing state court decisions rejecting *Belton* rule under state constitutions). Here, however, we are faced only with arguments based on the Fourth Amendment.

¶ 43 We can add our voice to the others that have urged the Supreme Court to revisit *Belton*. *See, e.g., Weaver,* 433 F.3d at 1107 (noting that *Belton* "is broader than its stated rationale" and suggesting that the Supreme Court re-examine this issue). We cannot, however, take it upon ourselves to re-examine *Belton's* interpretation of the Fourth Amendment. Because *Belton* allows the search of Gant's vehicle, I respectfully dissent.

W. Scott Bales, Justice

CONCURRING:

Ruth V. McGregor, Chief Justice

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February 25, 2008

Mr. Randall M. Howe
Chief Counsel
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Office of the Attorney General
1275 W. Washington
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RE: Arizona
v. Rodney Joseph Gant
No. 07-542

Dear Mr. Howe:

The Court today entered the following order in the above-entitled case:

The motion of National Association of Police Organizations, Inc. for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is granted limited to the following question. Does the Fourth Amendment require law enforcement officers tc demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicu lar search incident to arrest conducted after the

vehicle's recent occupants have been arrested and secured?

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

PETITIONER'S BRIEF

(91)

(8)

File Date:
May 12 2008

No. 07-542

In The
Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

vs.

RODNEY JOSEPH GANT,

Respondent.

On Writ Of Certiorari
To The Arizona Supreme Court

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

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OPINIONS BELOW

The Arizona Supreme Court's opinion is reported as *State v. Gant*, 216 Ariz. 1, 162 P.3d 640 (2007). (J.A. 150.) The Arizona Court of Appeals' opinion is reported as *State v. Gant*, 213 Ariz. 446, 143 P.3d 379 (App. 2006), *vacated*, 216 Ariz. 1, 162 P.3d 640 (2007). (Pet. App. B.) The order of the Superior Court of Arizona in and for the County of Pima dated December 7, 2004, denying the motion to suppress is unpublished. (J.A. 143.)

STATEMENT OF JURISDICTION

The Arizona Supreme Court entered the judgment from which relief is sought on July 25, 2007. (J.A. 150.) The State of Arizona filed its Petition for Writ of Certiorari in this Court on October 19, 2007, and this Court granted the petition on February 25, 2008. (*Id.* at 177.) This Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

> shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Background: *Arizona v. Gant* I.

On January 6, 2000, the State of Arizona indicted Gant on one count of possession of a narcotic drug for sale, a class 2 felony, and one count of possession of drug paraphernalia, a class 6 felony. (Direct Indictment, filed 1/6/00.) The charges were based on evidence seized during a search of the passenger compartment of Gant's automobile incident to his arrest for driving on a suspended license. (J.A. 151-52, ¶¶ 2-4.) Gant moved to suppress the evidence, claiming that the search was not incident to his arrest because he had exited his automobile before the police had arrested him. (*Id.* at 9-14.) Based on a stipulated record, the trial court denied the motion, the evidence was admitted, and a jury convicted Gant of the charges. (*Id.* at 21, 25-28, 43, 152-53.)

Gant appealed his convictions to the Arizona Court of Appeals, which reversed. *State v. Gant*, 43 P.3d 188, 194, ¶ 18 (Ariz. App. 2002). The appellate court ruled that the trial court should have suppressed the evidence because the police had not initiated contact with Gant before he stepped out of

his automobile. *Id.* at 194, ¶¶ 15, 18. The Arizona Supreme Court denied review, and the State petitioned this Court for a writ of certiorari, contending that under *New York v. Belton*, 453 U.S. 454 (1981), an arrestee's recent occupancy of the automobile, not the arrestee's "initial contact" with the police, is the sole constitutional prerequisite to a warrantless search of an arrestee's automobile incident to arrest. This Court granted certiorari. *Arizona v. Gant*, 538 U.S. 976 (2003).

Before argument on the case, the Arizona Supreme Court issued its decision in *State v. Dean*, in which it expressly rejected the Arizona Court of Appeals' "contact-initiation" analysis in *Gant* and held that under *Belton* the police may search the passenger compartment of an automobile incident to the arrest of the automobile's recent occupant. 76 P.3d 429, 437, ¶¶ 32-34 (Ariz. 2003). Consequently, this Court vacated the court of appeals' opinion and remanded the case for reconsideration in light of *Dean*. *Arizona v. Gant*, 540 U.S. 963 (2003). On remand, the court of appeals found that the stipulated record was inadequate to determine whether Gant was a recent occupant of his automobile at the time of arrest and ordered an evidentiary hearing on the issue. (Pet. App. B at 4, ¶ 3.)

B. Evidentiary Hearing.

At the evidentiary hearing, the State presented the testimony of the Tucson, Arizona, police officers

who arrested Gant and searched the passenger compartment of his automobile incident to his arrest. (J.A. 46, 96, 125.) In the afternoon of August 25, 1999, Officers Griffith and Reed received an anonymous tip that narcotics activity was occurring at a parti ılar house. (*Id.* at 46-47.) The officers went to that house, which had a white automobile parked nearby. (*Id.* at 47, 50.) Gant answered the door. (*Id.* at 47.) He provided the officers with identification and told them that the person who lived at the house was not there but would return later that afternoon. (*Id.* at 47-48.) The officers left. (*Id.* at 48.) Officer Griffith conducted a routine record check on Gant and discovered that his driver's license had been suspended and that an arrest warrant had been issued for him based on driving on a suspended license. (*Id.* at 49.)

The officers returned to the house that evening to contact the resident. (*Id.*) They found a man sitting in the driveway and an automobile parked in front of the house. (*Id.* at 50, 98.) While they talked with the man, another police officer arrived. (*Id.* at 50.) Officer Reed spoke with the man while Officer Griffith went toward the automobile. (*Id.* at 50, 98.) He found a woman sitting in the front seat. (*Id.* at 50.) After Officer Griffith spoke with the woman, she got out of the automobile. (*Id.*) Officer Griffith found narcotic paraphernalia in her purse and arrested her. (*Id.*) Meanwhile, Officer Reed learned that the man had provided a false name and arrested him as well. (*Id.* at 50, 98.) Once the man was properly identified,

Officer Reed discovered that arrest warrants had been issued for him. (*Id.* at 50.)

As the officers were arresting the man and the woman, they saw a white automobile – the same white automobile that they had seen earlier at the house – pull into the driveway. (*Id.*) Officer Griffith shined his flashlight into the automobile's passenger compartment and recognized Gant as the driver. (*Id.*)

Gant passed within three feet of Officer Griffith as he parked the automobile by the house. (*Id.* at 51, 53-54.) Gant's automobile was ten to twelve feet away from Officer Griffith. (*Id.* at 56.) Gant got out of the automobile, and Officer Griffith called him by name. (*Id.* at 54-55.) Gant responded, and Officer Griffith walked toward him while motioning him to approach. (*Id.* at 55.) Gant walked toward Officer Griffith and met him within ten seconds of getting out of his automobile. (*Id.* at 56.) Officer Griffith arrested and handcuffed him. (*Id.* at 57-58.) Officer Griffith was concerned for his safety because he and the two other officers now had three people in custody. (*Id.* at 60.)

Because Officer Reed had placed the man who had given a false name in one patrol car, and the other officer had placed the woman into his patrol car, Officer Griffith had no patrol car in which to place Gant. (*Id.* at 108-09.) Officer Griffith called for Officer Nolan to come to the house so that he could put Gant in Nolan's patrol car. (*Id.* at 109.) Officer Nolan arrived within two minutes, and Officer Griffith placed Gant in the patrol car. (*Id.* at 75-76.) Officers

Reed and Nolan immediately searched the passenger compartment of Gant's automobile and found drugs and a weapon. (*Id.* at 61-62, 109-10.)

On cross examination, Officer Griffith explained that he had officers search the automobile for "officer safety reasons."[1] (*Id.* at 75.) He acknowledged that four or five police officers were at the scene (*id.* at 58, 76) and that the scene was secure "[t]o a certain extent" (*id.* at 80), but he stated that he was still anticipating the arrival of the resident of the house (*id.*). In response to cross-examination about the unlikelihood that one of the arrestees might gain access to Gant's automobile, Officer Griffith noted, "Strange things have happened." (*Id.* at 80-81.)

When Officer Reed testified about the arrest and search, he stated that officer safety was an issue because the officers had not yet accounted for the resident or owner of the house whom Gant had said would return in the afternoon. (*Id.* at 111-12.) He explained why Gant's arrest created safety concerns for the officers:

> Officer safety is always an issue in a situation like that. It's a suspected drug activity area. It's not unusual for weapons to be involved in drug areas because people maintain weapons because they want to protect

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[1] Officer Griffith also testified that he expected the search to reveal evidence relating to Gant's suspended license offense, such as "license paperwork from the court system." (J.A. 73-74.)

> themselves not necessarily from law enforcement but also from other drug users or people [sic] might want to rob them of their drugs or money.
>
> As I mentioned before, we were at least reasonably aware that there may be somebody in the house because we hadn't made contact with the house the second point in time yet, and Mr. Gant had prior told us [sic] that he was not the resident.

(*Id.* at 112.) Officer Reed indicated, however, that Gant presented no threat to anyone once he was secured in the patrol car.[2] (*Id.* at 121.)

Upon consideration of the officers' testimony, the trial court ruled that the search of the passenger compartment of Gant's automobile was incident to his arrest because he was a recent occupant of the automobile. (*Id.* at 148-49.) The trial court found that the officers had contacted Gant immediately after he had gotten out of his automobile and had arrested him "seconds later." (*Id.*) The trial court also found that the officers had searched Gant's automobile "immediately" after he was handcuffed and placed in a patrol car. (*Id.*)

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[2] Officer Reed also testified that it would not be unusual for the search to reveal evidence relating to Gant's suspended license, such as a suspension notification or a citation for driving on a suspended license. (J.A. 111.)

C. Appellate Proceedings.

When the case returned to the court of appeals, the court reversed in a 2-1 decision. (Pet. App. B at 18, ¶ 21.) The majority ruled that the search of the passenger compartment of Gant's automobile was not incident to his arrest because the underlying justifications for such a search – the need to protect the officers' safety and the need to preserve evidence – were not present. (*Id.* at 15, ¶ 18.) The majority stated that the justifications for the search evaporated once Gant and the other arrestees were secured in patrol cars. (*Id.* at 8, ¶ 11.) The majority discounted the officers' expressed concerns about their safety and their uncertainty about the presence of people inside the house because the arrestees were secured in patrol cars. (*Id.* at 9, ¶ 11 n.4.) Without the existence of the justifications for the search, the court commented, the search was not contemporaneous with the arrest. (*Id.* at 15, ¶ 18.)

The dissent rejected this analysis, noting that the majority "single-handedly discard[ed] the bright-line rule set forth in" *Belton*. (*Id.* at 19, ¶ 22.) The dissent explained that the majority's decision returned Arizona law enforcement officers "to the uncertain and dangerous environment" in which, facing a highly volatile situation, they must calculate the probability that weapons or destructible evidence may be involved and estimate what items were or were not within the arrestee's reach at any particular point. (*Id.* at 22, ¶ 25; internal quotation marks and citations omitted.)

On review, the Arizona Supreme Court affirmed the court of appeals' decision by a 3-2 vote, agreeing that the search violated Gant's Fourth Amendment rights.[3] (J.A. 166-67, ¶ 25.) The majority ruled that the search was not incident to Gant's arrest because the underlying justifications for the search did not exist at the time of the search. (*Id.* at 157, ¶ 13.) The majority found that "neither a concern for officer safety nor the preservation of evidence" justified the search because Gant was handcuffed in a secured patrol car under police supervision and the other two arrestees were likewise handcuffed and secured. (*Id.*) Because the record revealed no unsecured civilians in the area and at least four officers were at the scene, the majority concluded that the officers "had no reason to believe that anyone at the scene could have gained access to Gant's vehicle or that the officers' safety was at risk." (*Id.*)

The majority rejected the argument that the underlying justifications for a search of the passenger compartment of an automobile incident to arrest are presumed to exist when a lawful arrest occurs. (*Id.* at 159-60, ¶¶ 16-17.) The majority stated that when the underlying justifications for a search cease, the validity of the search also ceases. (*Id.*) The majority insisted that this analysis was not inconsistent with *Belton*. (*Id.* at 156-58, ¶¶ 11-12, 14.) According to the

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[3] Gant made no claim under the Arizona Constitution, and the supreme court declined to consider its application to Gant's case. (J.A. 154, ¶ 8 n.1.)

majority, *Belton* delimited the *scope* of a search incident to arrest of an occupant of an automobile to include the automobile's passenger compartment, but did not address whether the police could still search the passenger compartment "at all once the scene is secure." (*Id.* at 156-57, ¶ 12.) The majority found that this Court's decision in *Thornton v. United States*, 541 U.S. 615 (2004), likewise did not establish when a search is appropriate because that decision merely held that recent occupants of automobiles are "occupants" for purposes of *Belton*. (*Id.* at 161-62, ¶¶ 19-20.)

The majority concluded that, because this Court had never adopted a bright-line rule for determining when a search of an automobile is justified incident to the recent occupant's arrest, the propriety of such a search depends on an examination of the "totality of the circumstances" of each case to determine whether the underlying justifications actually exist at the time of the search. (*Id.* at 164-66, ¶ 23.)

The dissenting justices found that the majority's analysis "departs from *Belton*'s determination that searches in this context should be guided by a 'straightforward rule' that does not depend on case-by-case adjudication." (*Id.* at 173, ¶ 39, quoting *Belton*, 453 U.S. at 458-59.) The majority's "totality of the circumstances" approach, the dissent noted, requires police officers in the field and reviewing courts after the fact to engage in a case-specific analysis that is "at odds with the core premise of *Belton*." (*Id.* at 173-74, ¶ 39.) The dissent found that

the search of Gant's automobile was valid under *Belton*. (*Id.* at 176, ¶ 43.)

SUMMARY OF ARGUMENT

The search of Gant's automobile incident to his arrest did not violate the Fourth Amendment. The Arizona Supreme Court held that the Fourth Amendment did not permit the search because the arresting officers had no reason to fear for their safety or to believe that Gant might destroy evidence in the automobile once the police had secured him in a patrol car. (J.A. 157, 166-67, ¶¶ 13, 25.) But the Fourth Amendment does not require that the police demonstrate that the arrestee actually poses a threat to their safety or to the preservation of evidence before they may conduct such a search. Twenty-seven years ago in *Belton*, this Court established a bright-line rule governing this type of search: "[W]hen a policeman has made a lawful custodial arrest of the recent occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460. This Court reaffirmed that holding in 2004 in *Thornton*. 541 U.S. at 623. No further demonstration is required.

Belton's bright-line rule is consistent with Fourth Amendment principles. The Fourth Amendment requires searches to be reasonable, and a *Belton* search strikes the proper balance between an

individual's right to privacy and the government's legitimate need to conduct the search. Because automobiles and their contents are exposed to public view and the use of automobiles is highly regulated, an individual has a reduced privacy interest in an automobile's passenger compartment. Weighed against that limited interest are the government's paramount interests in ensuring the safety of law enforcement officers and preserving evidence of crime. Arrests are inherently dangerous, with more than one hundred officers killed and thousands assaulted during arrests in the last decade. Arrestees, even those secured at the scene, and their confederates pose risks to officer safety and to the safeguarding of evidence. A search of an automobile's passenger compartment is essential to protect officers and evidence from these dangers.

Such a search is reasonable also because it is limited. Officers may search recent occupants of automobiles only when the occupants are lawfully arrested. They may search only the passenger compartment, not any other part of the automobile. And they may search the passenger compartment only as a "contemporaneous incident" to the arrest. *Belton* does not allow general, unrestrained searches.

Belton's bright-line rule promotes Fourth Amendment interests by providing a certain and clear guideline for the public and for officers in the field in determining the scope of an individual's protection and an officer's scope of authority under the Fourth Amendment. With the bright-line rule, an

individual knows that if he is arrested as a recent occupant of an automobile, he has no privacy right in the passenger compartment of his automobile. The arresting officer knows that he has the authority to search the passenger compartment of the arrestee's automobile as long as he does so as a contemporaneous incident to the arrest.

The alternative rule that the Arizona Supreme Court has promulgated – deciding the scope of the protection and the scope of authority based on a case-by-case analysis of the circumstances of the arrest – advances no Fourth Amendment interests and poses dangers to officers. If the validity of the search of the automobile's passenger compartment incident to arrest depends on an arresting officer's *ad hoc* assessment that he is secure from danger and that evidence will not be destroyed, a recent occupant of an automobile will not know the scope of his rights under the Fourth Amendment in any given case.

Likewise, an officer will not have any sure way to determine in any arrest situation whether he has the authority to search. The circumstances that factor into a determination that an arrest scene is secure are so numerous, and the effect of those circumstances on the safety of the scene is so fraught with uncertainty and subjective judgment, that officers cannot reasonably be expected to make decisions whether to search with any degree of consistency and accuracy. Either an individual's right under the Fourth Amendment will be violated, or an officer will have incorrectly evaluated the security of the arrest

scene, risking injury or death. In addition, a case-by-case analysis also creates litigation uncertainty because, once an officer searches the passenger compartment and seizes evidence of crime, attorneys and judges, months or years after the search, must determine whether the officer's decision was correct. This does nothing to protect Fourth Amendment rights.

In *Belton*, this Court chose the course that avoided these difficulties. *Stare decisis* counsels staying that course. *Belton*'s bright-line rule is workable, "a straightforward rule, easily applied, and predictably enforced." 453 U.S. at 459. The public and police officers alike know the extent of the Fourth Amendment's protection. Overruling *Belton* would cause hardship on law enforcement officers across the United States because they would have to be re-trained in arrest and search procedures and have to be taught to sift through a plethora of varying circumstances to determine whether they have authority to search. Nothing has changed in this Court's Fourth Amendment jurisprudence or in the nature of arrests of recent occupants of automobiles in the last 27 years to warrant overruling *Belton*. This Court should reaffirm *Belton* and hold that the search of Gant's automobile incident to his arrest did not violate the Fourth Amendment.

ARGUMENT

The Search of the Passenger Compartment of Gant's Automobile Incident to His Arrest Did Not Violate His Fourth Amendment Rights Regardless Whether He Posed a Threat to the Arresting Officers' Safety or Might Have Destroyed Evidence.

In the question presented, this Court has asked whether the Fourth Amendment requires arresting officers to demonstrate a threat to their safety or a risk of destruction of evidence to search the passenger compartment of an automobile incident to the arrest of its recent occupants. The answer is no. The Fourth Amendment does not require a case-by-case analysis to determine whether such a search is proper. In *Belton*, this Court established a bright-line rule that police may search the passenger compartment of an automobile incident to the arrest of its recent occupant without analyzing the actual risks in any given case. *Belton*'s bright-line rule is consistent with Fourth Amendment principles because it authorizes reasonable searches that appropriately balance the limited privacy interest of an arrestee with the government's interest in protecting the safety of arresting officers and preserving evidence of crime. Moreover, because this Court's decision in *Belton* in 1981 created a workable rule that informs police and public alike of the boundaries of the Fourth Amendment right to be free from unreasonable searches and seizures, principles of *stare decisis* counsel against overruling *Belton*.

A. *Belton*'s Bright-Line Rule Permits Searches of an Automobile's Passenger Compartment Incident to the Recent Occupant's Arrest Without a Fact-Specific Analysis of the Threat to Officer Safety or the Need to Preserve Evidence Related to the Crime of Arrest.

This Court first recognized that a search incident to arrest was reasonable under the Fourth Amendment in *Weeks v. United States*, 232 U.S. 383, 392 (1914). The Court had difficulty, however, in defining the scope of the search. Over the following decades it alternately expanded the scope to include the premises where the person was arrested and limited the scope to the area under the control of the person arrested at the time he was arrested. *See Chimel v. California*, 395 U.S. 752, 755-62 (1969) (recounting the decisional vacillations).

The vacillations ended in *Chimel*. The Court defined the scope to include "the arrestee's person and the area 'within his immediate control.'" *Id.* at 763. The Court concluded that the Fourth Amendment permits searches within that boundary because (1) "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons" that the arrested person "might seek to use in order to resist arrest or effect his escape"; (2) "it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction"; and (3) "[a] gun on a table or in a drawer in front of one arrested

can be as dangerous as one concealed in the clothing of the person arrested." *Id.*

This Court next addressed searches incident to arrest in *United States v. Robinson*, 414 U.S. 218 (1973). In that case, an officer arresting Robinson for driving on a revoked license searched his clothing and found heroin. *Id.* at 220-23. The lower court had held that the search of Robinson's clothing was improper because the arresting officer lacked probable cause to believe that Robinson had on his person any evidence relating to driving on a revoked license, *id.* at 233, or that Robinson might be armed, *id.* at 234.

This Court rejected such a limitation, noting that the government had the authority – "'always recognized under English and American law'" – "'to search the person of the accused when legally arrested to discover and seize fruits or evidences of crime.'" *Id.* at 225 (quoting *Weeks*, 232 U.S. at 392). The Court held that the fact of the arrest itself justifies a complete search of the person: "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search." *Id.* at 235.

The Court recognized that searches incident to arrest are justified by the "need to disarm the suspect" and the "need to preserve evidence on his person for later use at trial," *id.* at 234, but disagreed

with the lower court's conclusion that those justifications must actually exist in the case before a search is valid, *id.* at 235. An officer's decision to search is "necessarily a quick ad hoc judgment" that does not need "to be broken down in each instance" into an analysis of each step that must be subsequently litigated in every case:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.

Id. Thus, a search of a person incident to his arrest is reasonable under the Fourth Amendment. *Id.*

This Court applied the principles of *Chimel* and *Robinson* to searches incident to the arrest of automobile occupants in *Belton*. In that case, a New York State police officer stopped Belton for speeding on the New York Thruway. 453 U.S. at 455. As the officer spoke with Belton, he smelled burnt marijuana and saw an envelope on the automobile's floor that he associated with marijuana. *Id.* at 455-56. The officer arrested Belton and his three companions, patted them down for weapons, placed them each in separate areas of the Thruway, and searched the automobile. *Id.* at 456. In the backseat, he found Belton's leather jacket, searched it, and discovered cocaine in one of the pockets. *Id.*

On appeal, following Belton's conviction on drug possession charges, the New York Court of Appeals ruled that the search violated the Fourth Amendment because the jacket was "unaccessible" once the officer seized it, and there was "'no longer any danger that the arrestee or a confederate might gain access to the article.'" *Id.* (quoting *People v. Belton*, 407 N.E.2d 420, 421 (N.Y. 1980)). The state court opined that at the point that an arrestee "is effectively neutralized or the object is within the exclusive control of the police," "any exigency which would otherwise have justified a warrantless search has been dissipated and the search is no longer an incident to the arrest." *Belton*, 407 N.E.2d at 422.

This Court rejected such a case-by-case analysis. Recognizing that *Robinson* had established a "straightforward rule, easily applied, and predictably enforced," *Belton*, 453 U.S. at 459, and that lower courts had "found no workable definition" of *Chimel*'s "area within the immediate control of the arrestee" when the arrestee was a recent occupant of an automobile, *id.* at 460, this Court sought "a settled principle" to guide the police in these situations, *id.* Because "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m],'" *id.* (quoting *Chimel*, 395 U.S. at 763), this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous

incident of that arrest, search the passenger compartment of that automobile," *id.* This "bright-line" rule allows an officer to search a recent occupant's automobile incident to arrest regardless whether the officer actually fears for his safety or believes that evidence may be destroyed. *Michigan v. Long*, 463 U.S. 1032, 1049 n.14 (1983) (stating that "the 'bright line' that we drew in *Belton* clearly authorizes [a search of an automobile] whenever officers effect a custodial arrest").

This Court reaffirmed this point in *Thornton*. Thornton claimed that the search of his automobile incident to his arrest violated the Fourth Amendment and *Belton* because the police did not initiate contact with him when he was still an occupant of his automobile, but approached him only after he had left the automobile. *Thornton*, 541 U.S. at 618-19. He also claimed that even if he was an occupant of the automobile for purposes of *Belton*, the search was still improper because he could not physically reach the automobile's passenger compartment at the time he was arrested. *Id.* at 622 n.2.

In holding that *Belton* applies to recent occupants of automobiles as well as occupants, the Court explained that, although the passenger compartment was not likely readily accessible to Thornton, this did not affect the reasonableness of the search: "The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort

of generalization which *Belton* enunciated." *Id.* at 622-23 (footnote omitted). This Court reaffirmed *Belton*'s holding: "Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment." *Id.* at 623.

Robinson, *Belton*, and *Thornton* have answered the Court's question in this case. A search of the passenger compartment of an automobile incident to the lawful arrest of the automobile's recent occupant is reasonable under the Fourth Amendment even after the recent occupant is secured because the reasonableness of the search does not depend on demonstrating a threat to the arresting officers' safety or a need to preserve evidence.

B. *Belton*'s Bright-Line Rule Is Reasonable and Provides Clarity that Promotes Fourth Amendment Interests.

Belton's bright-line rule that an officer may search the passenger compartment of an automobile incident to the arrest of the recent occupant regardless whether the arrestee poses a threat to the officer's safety or might destroy evidence is consistent with Fourth Amendment principles. The Fourth Amendment protects individuals against "unreasonable searches and seizures." U.S. Const. amend. IV. *Belton*'s bright-line rule strikes the appropriate balance between an individual's privacy interest and

the government's legitimate interests in officer safety and evidence preservation and appropriately limits the scope of the search. Also, the bright-line rule promotes Fourth Amendment interests by providing clear guidelines for police officers in the field to determine when they have authority to search.

1. Searches conducted under *Belton*'s bright-line rule are reasonable.

A search incident to arrest "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Robinson*, 414 U.S. at 235. Such a search is reasonable even when it extends beyond the person of the arrestee to "the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Chimel*, 395 U.S. at 763. Determining that an arrestee's "area of control" includes the passenger compartment of an automobile when the arrestee is a recent occupant of that automobile – as this Court did in *Belton* – is reasonable as well. Whether a search is reasonable under the Fourth Amendment requires "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). The *Belton* rule strikes the proper balance.

a. *Belton*'s bright-line rule correctly balances the need for officer safety and evidence preservation with an arrestee's limited privacy interest in his automobile.

In evaluating the reasonableness of a search under *Belton*, an arrestee's privacy interest in his automobile must give way to the need to protect the arresting officers and to preserve evidence of crime. An individual has a reduced expectation of privacy in the contents of his automobile. *See, e.g., Houghton*, 526 U.S. at 303 (automobile searches intrude much less upon personal privacy and dignity than searches of persons, in light of the everyday exposure of automobiles and their contents to public view, police regulation, and potential involvement in traffic accidents); *California v. Carney*, 471 U.S. 386, 390-92 (1985) ("ready mobility" and pervasive regulation result in a reduced expectation of privacy in motor vehicles); *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (automobile searches are "far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building"). This reduced expectation of privacy is "diminished further when the occupants are placed under custodial arrest." *Robbins v. California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring in judgment) (citations omitted), *overruled on other grounds by United States v. Ross*, 456 U.S. 798 (1982); *see also United States v. Edwards*, 415 U.S. 800, 808-09 (1974) ("While the legal arrest of a person should

not destroy the privacy of his premises, it does – for at least a reasonable time and to a reasonable extent – take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.") (quoting *United States v. DeLeo*, 422 F.2d 487, 493 (1st Cir. 1970)).

The paramount interest in officer safety outweighs this limited privacy interest. Arrests, especially arrests of recent occupants of automobiles, are dangerous to police officers. *See Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (arresting automobile occupants presents "inordinate risk[s]" for officers); *Robinson*, 414 U.S. at 234 n.5 ("The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty."); *see also Washington v. Chrisman*, 455 U.S. 1, 7 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer."). Officers cannot predict how persons will react to being arrested. *Chrisman*, 455 U.S. at 7. Between 1997 and 2006, 133 of the 562 officers feloniously killed were killed during arrest situations. FBI U.S. Dep't of Justice, *Uniform Crime Report: Law Enforcement Officers Killed and Assaulted*, http://www.fbi.gov/ucr/killed/2006/feloniouslykilled.html, Table 19 (2006). In that same period, 100 of the officers feloniously killed were killed during traffic stops. *Id.* More than 58,000 officers were assaulted during the same time period, and more than 9,000 of those assaults occurred while attempting arrests, and more than 6,000 of those assaults occurred while making a

traffic stop. FBI U.S. Dep't of Justice, *Uniform Crime Report: Law Enforcement Officers Killed and Assaulted*, http://www.fbi.gov/ucr/killed/2006/officersassaulted.html, Table 66 (2006).

Because arrests are so dangerous and volatile, merely handcuffing the arrestee and securing him in a patrol car does not eliminate the risk to the officers. Handcuffed and secured arrestees, like Gant, can escape and threaten officers. *See Plakas v. Drinski*, 19 F.3d 1143, 1144-45 (7th Cir. 1994) (suspect handcuffed in the backseat of a patrol car escaped and later confronted police); *United States v. Sanders*, 994 F.2d 200, 210 & n.60 (5th Cir. 1993) (citing incidents in which handcuffed arrestees killed police officers). The chance that a secured arrestee may escape a patrol car and reach a weapon or destroy evidence in his automobile is admittedly small, but it is real. As Officer Griffith testified, "Strange things have happened." (J.A. 81.)

Moreover, handcuffing and securing an arrestee does not account for unknown confederates at the arrest scene. In Gant's case, for example, while Gant and two other people at the house were handcuffed and secured in separate patrol cars, the officers were concerned that the residents of the house had not yet been accounted for. (*Id.* at 79-80, 111-12.) Those persons could have come out of the house and gained entry to the automobile to grab a weapon or to destroy evidence. The circumstances surrounding Gant's arrest gave the officers reason to suspect that Gant had a weapon in the passenger compartment

of his automobile. The officers knew that people involved in drug activity maintain weapons to protect themselves from fellow criminals. (*Id.* at 112-13.) The officers came to the house earlier that day because of an anonymous tip about drug activity (*id.* at 47), and they found drug paraphernalia in the purse of the woman arrested at the house before Gant arrived (*id.* at 50). Gant indeed had a weapon in his automobile. (*Id.* at 110.) A search of the passenger compartment of Gant's automobile was necessary to eliminate the safety risk.

The same is true even if officers have accounted for everyone at a scene. For example, in *United States v. Doward*, police officers stopped Doward for a traffic infraction and arrested him after learning of a warrant for his arrest. 41 F.3d 789, 791 (1st Cir. 1994). Although the officers secured Doward in the patrol car, they still had to contend with Doward's passenger, whom they had no reason to arrest. *Id.* Although the officers ordered the passenger to get out of the automobile, *id.*, they still needed to search the passenger compartment to prevent him from potentially retrieving a weapon.

In addition, even when officers believe that they have accounted for everyone, the situation may change. In *Doward*, Doward's arrest attracted a crowd, and his daughter emerged from the crowd and interjected herself. *Id.* She, too, could have reached for the weapon in the automobile had the officers not searched it. An arrest may involve "rapidly evolving circumstances fraught with unpredictable risks to life and limb." *Id.* at 793; *see also id.* at 793 n.5 ("[T]he

unpredictable developments ultimately confronting the officers in this case clearly vindicate the *Belton* rationale."). Searching the passenger compartment of the arrestee's automobile is the only way to protect officers in these circumstances.

Officer safety, while the paramount governmental interest, is not the only interest weighing in favor of the *Belton* rule. The government also has an interest in preserving evidence of crimes. At the moment of a person's arrest, he is motivated "to take conspicuous, immediate steps to destroy incriminating evidence." *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). Without searching the passenger compartment of an automobile incident to the recent occupant's arrest, the recent occupant or a confederate may enter the automobile to remove or destroy evidence.

The balance between an individual's limited privacy interest in his automobile and the need to ensure officer safety and to preserve evidence tilts heavily in favor of the government. *See Robbins*, 453 U.S. at 431 (Powell, J., concurring in judgment) ("*Belton* trades marginal privacy of containers within the passenger area of an automobile for protection of the officer and of destructible evidence. The balance of these interests strongly favors the Court's rule."). *Belton* searches are therefore reasonable.

b. *Belton* searches are limited.

Belton searches are reasonable also because they are appropriately limited. *Belton* searches are

restricted in three ways. First, *Belton* authorizes a search of the passenger compartment of an automobile only if its recent occupant has been arrested. 453 U.S. at 460. If an arrestee is not a recent occupant of an automobile, but merely owns one or has access to one, *Belton* does not authorize a search. Second, *Belton* limits the search to the passenger compartment. *Id.* Recent occupants have access to the passenger compartment before the arrest and could easily conceal a weapon or drugs there. *Belton* does not permit the officers to conduct a general search of the entire automobile.

Third, the search must be a "contemporaneous incident" of the arrest. *Id.* Although this Court has not yet given a precise definition of "contemporaneous," lower courts have not permitted *Belton* searches when "the arrest and search are so separated in time or by intervening acts that the latter cannot be said to have been incident to the former." *United States v. McLaughlin*, 170 F.3d 889, 893 (9th Cir. 1999); *United States v. Abdul-Saboor*, 85 F.3d 664, 668 (D.C. Cir. 1996). For example, courts have held that taking the automobile to the police station before searching it or removing the arrestee from the scene of arrest are intervening acts that break the contemporaneity of the search with the arrest. *United States v. Wells*, 347 F.3d 280, 287 (8th Cir. 2003) (removing automobile from scene); *United States v. Lugo*, 978 F.2d 631, 634-35 (10th Cir. 1992) (removing arrestee from scene).

Thus, the scope of *Belton*'s bright-line rule is appropriately limited to serve the government's

particular needs in arresting a recent occupant of an automobile. Searches conducted under *Belton* are therefore reasonable.

2. *Belton*'s bright-line rule provides certainty and clarity that promotes Fourth Amendment interests.

Before this Court decided *Belton*, lower courts had great difficulty in applying *Chimel*'s "area of immediate control" standard to cases in which the arrestee was a recent occupant of an automobile. *Belton*, 453 U.S. at 459. Some courts found the passenger compartment of the automobile within the arrestee's immediate control, some courts found it outside his immediate control. *Id.* This Court recognized that this confusion undermined the Fourth Amendment: "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Id.* at 459-60.

This Court ended the confusion by establishing a bright-line rule: "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460. The rule does not depend on the existence in any particular case of the justifications underlying the search-incident-to-arrest exception to the warrant requirement. *Id.* at 459

(approving of *Robinson*'s rejection of the need to litigate the existence of the underlying justifications for a search incident to arrest).

From this bright-line rule, a recent occupant of an automobile who is arrested knows that he has no Fourth Amendment protection from a search of the passenger compartment of his automobile conducted as a contemporaneous incident to arrest. The arresting officer knows that he has the authority to search the passenger compartment of the arrestee's automobile as long as he searches it as a contemporaneous incident to the arrest.

This Court understood that police officers need bright-line rules to guide them in the field:

> [T]he protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."

Belton, 453 U.S. at 458 (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. Ct. Rev. 127, 142 (hereinafter LaFave)). The Fourth Amendment "'is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable'" to their law enforcement activities. *Id.* (quoting LaFave, 1974 S. Ct. Rev. at 141). "'A single, familiar standard

is essential[,]'" because officers "'have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *Id.* (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

The operational rules for officers in the field should not turn upon "'[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions.'" *Id.* (quoting LaFave, 1974 S. Ct. Rev. at 141). The Fourth Amendment "has to be applied on the spur (and in the heat) of the moment," and requires standards that are "sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). "Police shouldn't have to carry well-thumbed copies of the multivolume LaFave treatise on search and seizure with them wherever they go." *United States v. Pittman*, 411 F.3d 813, 816 (7th Cir. 2005).

For the past 27 years *Belton*'s bright-line rule has provided officers with the necessary clarity to easily determine when they may search and when they may not. Of course, situations can arise on the margins that will test the limits of the rule, and trial courts may have to decide close questions whether a person was a "recent occupant" or whether the police conducted the search as a "contemporaneous incident" to the arrest. But in the overwhelming majority of cases, the *Belton* rule has been "a straightforward rule,

easily applied and predictably enforced." *See Belton*, 453 U.S. at 459.

In contrast to applying *Belton*'s bright-line rule, using a case-by-case analysis to determine whether the police may search the passenger compartment of an automobile incident to the arrest of the recent occupant – as the Arizona Supreme Court did in this case – provides no guidance to police officers or to individuals regarding the scope of their Fourth Amendment rights. In a case-by-case analysis, officers can search the passenger compartment only if they find that the justifications underlying the search-incident-to-arrest exception – the need to protect officer safety and to preserve evidence of crime – actually exist at the time of arrest. (J.A. 157, ¶ 13.)

Determining the validity of these searches on a case-by-case basis leaves the public and police at sea in understanding the Fourth Amendment's boundaries. Because every arrest situation is different, with a myriad of variable and unpredictable circumstances, the arrestee has no idea whether he has any privacy interest in the passenger compartment of his automobile, and the arresting officers have no true and quick way of determining whether searching the passenger compartment is permissible under the Fourth Amendment. Arrests are dangerous, and "police must act decisively and cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp." *United States v. Lyons*, 706 F.2d 321, 330 (D.C. Cir. 1983).

The consequences to the officers if they make a mistake about the apparent security of the arrest scene are grave indeed.

Police face a multitude of circumstances that have varying effects on the security of the arrest scene. In this case, for example, the Arizona Supreme Court believed that six circumstances showed that the arrest scene was sufficiently secure that the arresting officers had no reason to fear for their safety or to believe that evidence might be destroyed: (1) Gant was handcuffed; (2) Gant was secure in a patrol car; (3) an officer "supervised" Gant while he was in the patrol car; (4) two other persons at the scene had been handcuffed and secured in patrol cars; (5) four police officers were at the scene; and (6) one officer believed that the scene was "secure." (J.A. 157, ¶ 13.)

Such an analysis – even assuming it were correct – provides no guidance for officers in the field when they face circumstances that vary even slightly. What if three, not four, officers were present? What if the officers did not have enough patrol cars in which to secure Gant and all of his confederates? Luckily for Officer Griffith, an additional patrol car was nearby, or else he would not have been able to secure Gant. (*Id.* at 108-09.) If that patrol car had not been nearby, would a handcuffed Gant be sufficiently secure for the officers to determine that he posed no threat to their safety, precluding a search incident to arrest?

What if Gant had passengers in his automobile when he was arrested? Because the officers arrested Gant on a warrant for driving on a suspended license, they would have no cause to arrest or otherwise secure the passengers. Would the passengers' freedom from restraint have justified the officers in searching Gant's automobile? The passengers could have known about the location of the weapon in Gant's automobile and used it to deadly effect, or at the very least removed or destroyed the drugs in the automobile. What if, even though Gant and all the other arrestees were secure in patrol cars, the officer still felt threatened? Would that have justified a search of Gant's automobile? While Officer Reed testified that Gant himself posed no threat after he was secure in the patrol car, he also was concerned about the owner or resident of the house whom Gant had said would return and had not yet been accounted for. (J.A. 111-12.)

These are just some of the questions that arresting officers – the rookie and the seasoned veteran alike – would have to resolve "on the spur (and in the heat) of the moment." *Atwater*, 532 U.S. at 347. In many instances, the officers would be unaware of all of the circumstances that could affect their safety, and they often would need to speculate about the effect of some of the circumstances. This Court established *Belton*'s bright-line rule to eliminate the need for arresting officers to simultaneously sift through all the possible relevant circumstances while thumbing through LaFave to determine whether the Fourth

Amendment permits them to search the passenger compartment. That is why this Court reaffirmed *Belton*'s bright-line rule in *Thornton*. 541 U.S. at 622-23 ("The need for a clear rule, readily understood by police officers . . . justifies the sort of generalization that *Belton* enunciated."); *see also Robbins*, 453 U.S. at 431 (Powell, J., concurring in judgment) ("[P]ractical necessity requires that we allow an officer in these circumstances to secure thoroughly the automobile without requiring him in haste and under pressure to make close calculations about danger to himself or the vulnerability of evidence.").

A case-by-case approach also creates litigation uncertainty: "[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater*, 532 U.S. at 347; *see also Oliver v. United States*, 466 U.S. 170, 181 (1984) ("This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances."). Not only must officers in the heat of the arrest weigh and balance innumerable circumstances to determine whether a search of the passenger compartment would be properly incident to the recent occupant's arrest, but once they have made that decision, attorneys and judges in the cool security of the courtroom must review that decision in

hindsight to determine whether the officers' decision was correct. Such after-the-fact analysis is of little help to the officers in the field – doing nothing to ensure that Fourth Amendment rights are protected *before* the police act – and causes distrust of the judicial system when evidence is suppressed even though the police officers acted in good faith.[4]

By eschewing a case-by-case analysis and adopting a bright-line rule in *Belton*, this Court has given appropriate guidance to police officers in the field while protecting Fourth Amendment rights. The *Belton* rule clearly and easily resolves Gant's case. Because of *Belton*, Officers Griffith and Reed understood that their lawful arrest of Gant, whom they knew to be a recent occupant of an automobile, authorized them to search the passenger compartment incident to that arrest. The officers did not need to weigh and balance the plethora of circumstances that surrounded the arrest to determine whether Gant or a confederate posed a sufficient danger to them or to the preservation of evidence to justify the search.

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[4] In his concurrence in *Thornton*, Justice Scalia suggested that, rather than continuing to follow *Belton*'s bright-line rule, a search of the passenger compartment incident to the arrest of a recent occupant be limited to situations "[w]hen officer safety or imminent evidence concealment or destruction is at issue," or when "it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle." 541 U.S. at 632. This rule, however, suffers from the same inadequacies as the Arizona Supreme Court's rule. Officers would still need to analyze the circumstances of each arrest "on the spur (and in the heat) of the moment." *Atwater*, 532 U.S. at 347.

Gant suffered no Fourth Amendment violation, and the Arizona Supreme Court's decision to the contrary should be reversed.

C. Principles of *Stare Decisis* Favor Affirming *Belton*'s Bright-Line Rule Because the Rule Is Workable and Protects Fourth Amendment Interests, and No Special Justification Exists to Overrule It.

This Court has already answered the question posed in this case in *Belton* and recently reaffirmed that answer in *Thornton*: The police may search the passenger compartment of an automobile as a contemporaneous incident to the lawful arrest of a recent occupant of that automobile without demonstrating a threat to their safety or a need to preserve evidence. *Belton*, 453 U.S. at 460; *Thornton*, 541 U.S. at 623. Because *Belton* established a workable rule that guides police and protects individuals' Fourth Amendment rights, principles of *stare decisis* counsel against overruling *Belton* and *Thornton*.

"[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it." *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (plurality opinion). Respect for precedent is indispensable to the rule of law. *Id.* *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne*

v. Tennessee, 501 U.S. 808, 827 (1991). Although *stare decisis* is a "principle of policy" rather than an "inexorable command," *id.* at 828, "the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification,'" *id.* at 842 (Souter, J., concurring) (quoted favorably in *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

In determining whether a "special justification" exists to overrule a precedent, this Court examines "a series of prudential and pragmatic considerations" to test whether overruling a particular precedent is consistent with the rule of law and to "gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood*, 505 U.S. at 854. Such considerations are whether (1) the rule set forth in the precedent is workable, (2) the rule is subject "to a kind of reliance that would lend a special hardship" to its overruling and "add inequity to the cost of repudiation," (3) the law has developed in a way that leaves the rule "a remnant of abandoned doctrine," or (4) "facts have so changed[ ] or come to be seen so differently" that the rule no longer has "significant application or justification." *Id.* at 854-55.

None of these considerations warrants overruling *Belton* and *Thornton*. First, *Belton*'s bright-line rule is workable. Officers understand that when they lawfully arrest a recent occupant of an automobile they may search the passenger compartment of that automobile as a contemporaneous incident to the arrest. The rule is, as this Court wanted it to be, "a

straightforward rule, easily applied, and predictably enforced." *Belton*, 453 U.S. at 459. Only the alternative is unworkable -- a case-by-case analysis of each arrest situation. As explained *supra* at 32-35, the circumstances of an arrest situation are too volatile, too variable, and too numerous to require police officers to assess them before deciding whether they have authority to search the passenger compartment. Mistaken assessments can be deadly.

Second, police officers have relied on the *Belton* rule for the last 27 years in conducting searches incident to an arrest of a recent occupant of an automobile, and overruling *Belton* would cause them "special hardship." *Belton* searches have now become routine police practice. *Cf. Dickerson*, 530 U.S. at 443 (upholding *Miranda v. Arizona,* 384 U.S. 436 (1966), on *stare decisis* grounds because *Miranda* warnings have "become embedded in routine police practice" and "have become part of our national culture"). Overruling *Belton* would mean extensive retraining for police agencies across the United States in arrest and search procedures, retraining that requires officers to finely and carefully analyze the circumstances of an arrest to determine whether the situation is dangerous or whether the arrestee or a confederate – or someone unknown in the crowd – might reach into the passenger compartment for a weapon or to destroy evidence. This Court has recognized that such a "'drawing of subtle nuances or hairline distinctions'" may be "'literally impossible'" for the officer in the field. *Belton*, 453 U.S. at 458

(quoting LaFave, 1974 S. Ct. Rev. at 141). Overruling *Belton* would undoubtedly make it more difficult for police to conform their conduct to the requirements of the Fourth Amendment.

Third, no principle of law has developed in such a way to make *Belton* "a remnant of abandoned doctrine." This Court cited *Belton* in 2001 in *Atwater* for the need to have bright-line rules in Fourth Amendment jurisprudence. 532 U.S. at 347. And, far from abandoning *Belton*, this Court reaffirmed *Belton* in 2004 in *Thornton*. 541 U.S. at 623. "A litigant who in effect asks [the Court] to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980).

Fourth, no facts have changed since *Belton* that warrant its reconsideration. This Court reaffirmed its view in *Belton* from *Robinson* that police need "straightforward rule[s], easily applied, and predictably enforced" in deciding when searches are appropriate under the Fourth Amendment. 453 U.S. at 459. That view has carried forward to *Atwater* and *Thornton*. *Atwater*, 532 U.S. at 347; *Thornton*, 541 U.S. at 622-23. Although some members of this Court have questioned the factual validity of *Belton*'s generalization that the passenger compartment of an automobile is within the secured recent occupant's immediate area of control, *Thornton*, 541 U.S. at 626 (Scalia, J., concurring in judgment) (calling "speculative" the fear that a secured arrestee can retrieve a weapon or evidence from his automobile);

see also id. at 624 (O'Connor, J., concurring) (referring to *Belton*'s "shaky foundation"), this debate was the core of the dispute at the time the Court adopted the bright-line rule, *see Belton*, 453 U.S. at 468 (Brennan, J., dissenting) ("[T]he Court for the first time grants police officers authority to conduct a warrantless 'area' search under circumstances where there is no chance that the arrestee 'might gain possession of a weapon or destructible evidence.'") (quoting *Chimel*, 395 U.S. at 763). Neither the facts regarding arrests of recent occupants of automobiles, nor the perception of those facts, have changed in such a way to diminish *Belton*'s validity.

None of the prudential or pragmatic considerations in determining whether to overrule precedent justifies overruling *Belton*. One other consideration militates against overruling *Belton*: overruling *Belton* would undermine the validity of *Chimel*. *Belton*'s validity has been attacked because of the questioned accuracy of its generalization that the passenger compartment of the automobile is within the reach of the recent occupant once he is secured away from the automobile. *See Thornton*, 541 U.S. at 626 (Scalia, J., concurring in judgment) (stating that such a person would need the "skill of Houdini and the strength of Hercules"); *see also, e.g.*, Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 Wis. L. Rev. 657, 676 (hereinafter Moskovitz) (stating that *Belton*'s generalization is false). But *Chimel* is based on a similar generalization: a person arrested and handcuffed

inside a house may still reach a weapon on a table or in a drawer within the room where he was arrested. 395 U.S. at 763.

Once an arrestee is handcuffed, his ability to grab a weapon is substantially reduced. *See, e.g.*, *State v. Murdock*, 455 N.W.2d 618, 620 (Wis. 1990) (four detectives entered defendant's room, arrested and handcuffed defendant and two others, and made them lie on the floor; neither defendant nor the other arrestees attempted to escape or interfere with search of room incident to their arrest). Often, officers arrest a person inside a house, handcuff and remove him from the room or house, and *then* search the room in which he was arrested according to the area that he could have reached at the time of arrest. *See United States v. Turner*, 926 F.2d 883, 885-86 (9th Cir. 1991) (officers arrested defendant in his bedroom based on arrest warrant; officers handcuffed and secured defendant in another room and searched bedroom incident to arrest); *Davis v. Robbs*, 794 F.2d 1129, 1130 (6th Cir. 1986) (officers arrested defendant in home after observing crime occur; after arresting defendant and placing him in squad car, officers searched room where they arrested defendant incident to arrest and seized weapon). Such searches are upheld because *Chimel* established a bright-line rule that applies regardless whether arrestees could actually endanger officers or destroy evidence. *Turner*, 926 F.2d at 887-88 (validity of search determined by defendant's reach area at the time of arrest, not time of the search); *Davis*, 794 F.2d at 1131

(same); *see also Murdock*, 455 N.W.2d at 624 ("actual accessibility, as a practical matter, cannot be the benchmark determining the authority to search").

Should this Court determine that *Belton* is wrong because the generalization underlying its bright-line rule is not true, that determination would undermine *Chimel*'s rationale as well. *See* Moskovitz, 2002 Wis. L. Rev. at 677 ("The problem [with *Belton*'s generalization] can be traced back to the flaw in *Chimel* itself."). If *Chimel* were undermined, this Court would have to reexamine the proper scope of searches incident to arrest in all contexts, an issue with which this Court had struggled for 50 years before *Chimel*. 395 U.S. at 755-62.

This Court need not reopen that question, however, because this Court need not reconsider *Belton*. The principles of *stare decisis* support reaffirming *Belton* and its bright-line rule: when police lawfully arrest a recent occupant of an automobile, they may, as a contemporaneous incident to that arrest, search the passenger compartment of the automobile without demonstrating a threat to their safety or a need to preserve evidence related to the crime of arrest. Under that rule, the police officers properly searched the passenger compartment of Gant's automobile incident to his arrest. The Arizona Supreme Court's decision that the Fourth Amendment required the police to demonstrate that Gant posed a threat to

their safety or to the preservation of evidence is wrong.

CONCLUSION

For these reasons, the State of Arizona respectfully requests that this Court reverse the *Gant* opinion and hold that the search of Gant's automobile incident to his arrest was constitutional under *Belton* and *Thornton*.

Respectfully submitted,

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RESPONDENT'S BRIEF

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Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

RODNEY JOSEPH GANT,

Respondent.

On Writ of Certiorari to the Arizona Supreme Court

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QUESTION PRESENTED

Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

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INTRODUCTION

Petitioner and its *amici* propose a radical departure from this Court's Fourth Amendment jurisprudence. They ask this Court to give authorities *carte blanche* to conduct warrantless vehicle searches in all situations involving a recent occupant's arrest, irrespective whether exigencies render the search imperative. They acknowledge that the search-incident-to-arrest doctrine rests on the twin exigency rationales of preventing the arrestee from accessing weapons or destroying evidence but maintain that authorities nonetheless may search a vehicle "incident" to a recent occupant's arrest even when the arrestee cannot conceivably access the vehicle, let alone weapons or evidence that may be inside of it.

Because petitioner's and *amici*'s rule departs from the fundamental basis underlying lawful searches incident to arrest – *i.e.*, the need to protect officers and evidence – this Court should reject it. Here, respondent was firmly in police custody – handcuffed and secured in a locked squad car from which he could not escape – when police searched his car. The lower court properly concluded that this search violated Fourth Amendment reasonableness standards because respondent could reach neither weapons nor evidence located in the vehicle. This Court should affirm.

STATEMENT OF THE CASE

1. On August 25, 1999, Tucson Police Department Officers Todd Griffith and Robert Reed responded to an anonymous tip of possible narcotics activity at a residence, located at 2524 North Walnut Street, Tuscon, Arizona. JA 16, 47, 98, 145. After knocking on the front door, the officers were greeted by

respondent, Rodney Gant, who identified himself and informed the officers that the homeowner would return later that day. JA 47-48, 145. After leaving the residence, Officers Griffith and Reed ran respondent's name through a records database, which revealed that respondent had a suspended license and an outstanding warrant for failure to appear on a driving-on-a-suspended-license charge. JA 48-49, 145.

Later that day, the officers returned to the residence. JA 48-49, 98, 145. Upon arrival, they found two individuals outside the home – a man, Jackie White, in the backyard and a woman, Ms. Porras, in a car parked in front of the house. JA 50, 98-100, 108-09, 145. After a third officer, Officer Ambrose, arrived on scene, the police obtained Porras's consent to search her car and uncovered a crack pipe. JA 50, 60, 108, 145. The officers arrested Porras for possession of drug paraphernalia. *Id.* Upon learning that White had given them a false name, the police also arrested him. JA 50, 98, 108, 145. Both White and Porras were handcuffed following their arrests and placed in the backseats of separate squad cars.[1] JA 145.

After White and Porras were secured in squad cars, respondent drove his car into the residence's driveway. JA 114, 145. Officers Griffith and Reed immediately recognized the car from their earlier visit to the house. JA 10, 145. As respondent pulled into the driveway, Officer Griffith shined his flashlight into the car and confirmed that respondent was the driver. JA 10, 50-52. Respondent parked

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[1] The record indicates that no other arrests were made in connection with the anonymous tip of drug-related activity at the Walnut Street residence. JA 58, 145-46.

and exited his car, firmly shutting the car door. JA 50, 51-52, 70-71, 100. Officer Griffith, then approximately 18-to-20 feet from the car, began to walk toward it, while calling to respondent. JA 57, 70-71, 145. Respondent then began to walk toward Officer Griffith. The two met eight-to-12 feet from the car. JA 56, 61, 106, 145. Officer Griffith immediately handcuffed and arrested respondent for driving on a suspended license and on the basis of the outstanding warrant. JA 57-58, 145-46.

Because Porras and White were secured in the only squad cars on scene, Officer Griffith radioed for backup. JA 109. The officers waited approximately five minutes for Officers Griffin and Nolan to arrive and spent another two minutes securing respondent in the backseat of their squad car. JA 61-62, 117-18. At this point, five officers were on scene – Officers Griffith, Reed, Ambrose, Griffin, and Nolan, JA 58, 76 – and all three subjects were secured in separate squad cars that were incapable of being opened from inside, JA 77, 119.[2] Officer Reed deemed the scene now secure. JA 120-21. With respondent handcuffed in the backseat of a locked squad car, respondent "had no access to anything else," especially his car. *Id.* Officer Reed acknowledged that respondent "no longer presented a threat to me or anyone else." JA 121. According to Officer Griffith, there was no "reasonable possibility" that respondent could have escaped from the squad car or gained access to his car.[3] JA 80.

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[2] The record indicates that all three subjects cooperated with the officers and that they were arrested and taken into custody without incident. JA 145-46.

[3] Petitioner contends that, "[i]n response to cross-examination about the unlikelihood that one of the arrestees might gain access to Gant's automobile, Officer Griffith noted, 'Strange

Only after respondent was secured in a squad car did Officers Reed and Nolan proceed to search respondent's car. JA 126, 128. Officer Reed uncovered a handgun somewhere within the interior compartment. JA 127. Officer Nolan discovered a plastic baggie containing cocaine in the pocket of a jacket in the backseat. JA 26, 127. Throughout the search, Officer Griffith supervised respondent and remained in the "immediate area" of the squad car in which respondent was secured. JA 77. The search of respondent's vehicle thus was undertaken, in the words of Officer Griffith, "[b]ecause the law says we can do it," JA 75, or, in words of Officer Nolan, to find "[j]ust anything of evidence as search incident to his arrest," Trial Tr. 9/13/00, at 21.

2. Respondent was charged with possession of a narcotic drug for sale and possession of drug paraphernalia. JA 152. He moved to suppress the evidence seized from his car, arguing the warrantless vehicle search violated the Fourth Amendment. JA 9. The superior court denied his motion, JA 43, 143, and a jury convicted respondent of both charges, JA 143.

Respondent appealed his conviction to the Arizona Court of Appeals, contending that the superior court erred in denying his motion to suppress. *State* v.

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things have happened.'" Pet. Br. 6 (quoting JA 80-81). This testimony concerned whether Porras could have reached respondent's car, given Officer Griffith's testimony that Porras was handcuffed in the yard when respondent arrived and not yet secured in a squad car. JA 76. Thus, this testimony only relates to whether Porras could have reached respondent's car from the yard. The superior court expressly found that Porras was secured in a squad car before respondent's arrival, JA 145 – presumably crediting Officer's Reed testimony to this effect, JA 108-09, 114 – a point reaffirmed by the Arizona Supreme Court, JA 152. Officer Griffith testified that there was no reasonable possibility of an arrestee escaping from a squad car.

Gant, 43 P.3d 188 (Ariz. Ct. App. 2002). The appeals court agreed, holding that, because respondent voluntarily stopped and exited the car, the warrantless search was not justified under *New York* v. *Belton*, 453 U.S. 454 (1981). *Gant*, 43 P.3d at 194. The Arizona Supreme Court denied the state's request for review. JA 153.

The State then successfully petitioned this Court for a writ of certiorari. *Arizona* v. *Gant*, 538 U.S. 976 (2003). After the parties had submitted merits briefs but before oral argument, the Arizona Supreme Court decided *State* v. *Dean*, 76 P.3d 429 (Ariz. 2003) (en banc), which repudiated the reasoning the court of appeals adopted in this case. The *Dean* court held that *Belton* may apply "when [one] is arrested 'in close proximity to the vehicle immediately after [he] exits the automobile.'" *Id.* at 437 (internal quotation marks omitted). This Court summarily vacated the court of appeals' judgment and remanded the case for reconsideration in light of *Dean*. *Arizona* v. *Gant*, 540 U.S. 963 (2003).

3. The court of appeals immediately remanded the case to the superior court for an evidentiary hearing and instructed the court to make factual findings relevant to whether respondent was a "'recent occupant.'" JA 144. Following an evidentiary hearing, the superior court concluded that respondent was a "recent occupant" under *Dean* and held the vehicle search "justified as incident to his arrest." JA 149, 153. Gant appealed, and the Arizona Court of Appeals reversed. *State* v. *Gant*, 143 P.3d 379 (Ariz. Ct. App. 2006). It held that "the officers did not search Gant's car contemporaneously with his arrest" because neither rationale underlying the search incident to arrest doctrine identified in *Chimel* v. *California*, 395 U.S. 752 (1969), justified the search

once respondent was secured in the squad car. *Gant*, 143 P.3d at 385; see JA 153-54.

The Arizona Supreme Court affirmed. It rejected the state's argument that *Belton* always authorizes police to search a recent occupant's vehicle incident to arrest. Relying principally upon *Chimel* – which this Court also relied upon in *Belton* – the court concluded that authorities may conduct a search incident to arrest only when *Chimel*'s "rationales of officer safety and preservation of evidence" are conceivably implicated. JA 155. Consonant with these rationales, authorities may search only the arrestee's person and "'the area from within which he might gain possession of a weapon or destructible evidence.'" *Id.* (quoting *Belton*, 453 U.S. at 763).

Belton, in the court's view, defined the "permissible scope" of an "otherwise lawful search of an automobile incident to arrest" and did not address the "threshold question" "whether police may conduct a search incident to arrest at all once the scene is secure." JA 155-57. The search in *Belton* was lawful because the arrestees remained unsecured and at the side of the car during the search, implicating *Chimel*'s twin rationales – there remained the conceivable threat that the arrestees would reach into the car to obtain a weapon or destroy evidence. JA 158.

The Court found that the search here, by contrast, was not lawful. At the time of the search, respondent, White, and Porras were handcuffed and locked in patrol cars, with four or five officers on the scene and in close proximity. JA 157. The court concluded that there was "no reason to believe that anyone at the scene could have gained access to Gant's vehicle or that the officers' safety was at risk." *Id.*

SUMMARY OF ARGUMENT

1. Petitioner fails to satisfy its burden of demonstrating the reasonableness of the warrantless search of respondent's car. In particular, petitioner heavily relies upon the so-called "bright-line rule" derived from *Belton*. There, the Court held that "the entire passenger compartment may be searched *when* 'the area within the immediate control of the arrestee" ... arguably includes the interior of an automobile *and* the arrestee is its recent occupant.'" *Thornton* v. *United States*, 541 U.S. 615, 623 n.3 (2004) (emphases added) (quoting *Belton*, 453 U.S. at 460).

Petitioner cannot show that respondent's area of immediate control "arguably include[d] the interior of [his] automobile." *Id.* The meaning of "the area of immediate control" was well-settled long before *Belton*. In *Chimel*, this Court construed that phrase to "mean the area from within which [the arrestee] might gain possession of a weapon or destructible evidence," 395 U.S. at 763, and in cases following *Chimel*, the Court has made clear that an area is within an arrestee's immediate control so long as there is a present "danger that the arrestee might gain access to the [area] to seize a weapon or destroy evidence." *United States* v. *Chadwick*, 433 U.S. 1, 15 (1977).

Because petitioner was handcuffed and secured in a squad car at the time of the search, there plainly was no conceivable danger that he would gain access to his car to obtain a weapon or destroy evidence. As such, petitioner has not – and cannot – satisfy the *Belton* rule.

2. Petitioner and its *amici* are left to advance a construction of *Belton* that ignores its language and

reasoning and is inimical to this Court's Fourth Amendment jurisprudence. They argue that *Belton* authorizes every vehicle search incident to a recent occupant's arrest, subject only to the vague limitations of attenuated time and/or distance. This test is problematic not only because it disregards the language of *Belton*, which this Court recently reaffirmed in *Thornton*, but also – and more fundamentally – because it would permit searches in situations that are not justified by the exigency rationales underpinning the search-incident-to-arrest doctrine upon which *Belton* is founded.

Petitioner and its *amici* offer only one limitation upon vehicle searches incident to arrest – that the search occur as a "contemporaneous incident" of arrest. They contend that this proviso merely requires that the search occur within close spatiotemporal proximity to the arrest. But this Court unambiguously has held that a search is not "incident to th[e] arrest ... if ... no exigency exists." *Chadwick*, 433 U.S. at 15. This requirement prohibits searches of areas that are not conceivably accessible to the arrestee at that time.

3. Petitioner and its *amici* retreat to the contention that exigencies that existed at that time justified the search of respondent's car. But this argument hinges on the counterintuitive supposition that an arrestee who is handcuffed and secured in a patrol car could access his car. This argument strains credulity and is wholly unsupported.

Petitioner and its *amici* further speculate about a purported threat by unseen third parties. Such an argument has no basis in *Chimel* or *Belton*, and this Court has expressly found that the search-incident-to-arrest doctrine is concerned only with the threat posed by the arrestee himself. See *Maryland* v. *Buie*,

494 U.S. 325, 336 (1990) ("The justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee."). What is more, this Court has authorized warrantless searches under this exigency rationale and has limited their scope to cursory visual inspections of the area immediately surrounding the place of arrest in which a third party could be hiding. *Id.* at 335-36. The search of respondent's car clearly exceeded the permissible bounds under this rationale.

4. Assuming *arguendo* that petitioner and its *amici* correctly have interpreted *Belton*, then this Court should limit *Belton* to its fact and hold it no longer applicable to circumstances like these. Critically, the generalization upon which *Belton* rests under this construction – that recent occupants are capable of accessing a car's entire passenger compartment – has proven empirically false. Standard practices of using handcuffs and securing arrestees in squad cars plainly put the passenger compartment beyond most arrestees' conceivable reach. Given this practice, *Belton*'s so-called bright-line rule produces results that could not obtain under *Chimel*.

Moreover, *Belton* has failed in its chief mission of providing a clear rule easily applied. Petitioner's and its *amici*'s interpretation eliminates one fact-specific question – whether the area to be searched presently is within the arrestee's immediate control – and replaces that question with several others that are no easier to resolve. "Contemporaneous incident," for example, is a phrase that is open to subjective interpretation, obfuscation, and abuse. Nor is it clear what exceptions for "intervening events" (that would preclude a subsequent search) are cognizable under this interpretation. At bottom, petitioner and

its *amici* have not resolved line-drawing issues but created new ones untethered to *Chimel*'s twin rationales, which petitioner's rule would only exacerbate.

Petitioner and its *amici*, as a last effort, contend that *all* vehicle searches incident to arrest are reasonable under the Fourth Amendment. This argument is predicated upon the false premise that the privacy intrusion involved in a vehicle search is minimal. This Court, however, has found vehicle searches to entail a "substantial invasion of privacy," *United States* v. *Ortiz*, 422 U.S. 891, 896 (1975), and it has repeatedly noted that the interference with one's privacy and freedom of movement attendant to an arrest does not justify further intrusions, see, *e.g.*, *Chimel*, 395 U.S. at 766 n.12. On the other hand, petitioner and its *amici* have not identified a particularly weighty government interest. With the arrestee secured in a squad car, the threat to police safety and evidence destruction is negligible.

ARGUMENT

I. THE FOURTH AMENDMENT ONLY PERMITS WARRANTLESS SEARCHES INCIDENT TO ARRESTS WHEN SPECIFIC EXIGENT CIRCUMSTANCES EXIST.

Petitioner bears the burden of persuading this Court that the warrantless search it conducted falls within the "jealously and carefully drawn," *Jones* v. *United States*, 357 U.S. 493, 499 (1958), exceptions to the long-established rule that warrantless searches "are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions," *Katz* v. *United States*, 389 U.S. 347, 357 (1967) (footnote omitted). Petitioner cannot carry this burden in the

circumstances of this case under the only exception it raises – the exception for searches incident to lawful, custodial arrests.[4]

A. All Searches Incident To Arrest Must Rest On *Chimel*'s Twin Exigency Rationales.

This Court repeatedly has reaffirmed that warrantless searches incident to arrest are justified by two – and only two – exigencies: "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles* v. *Iowa*, 525 U.S. 113, 116 (1998) (citing cases going back to *Weeks* v. *United States*, 232 U.S. 383, 392 (1914)); *accord Thornton*, 541 U.S. at 620 (identifying exigencies as "the need to remove any weapon the arrestee might seek to use to resist arrest or to escape, and the need to prevent the concealment or destruction of evidence"); *Chimel*, 395 U.S. at 764 (identifying exigencies as (1) "the need to seize weapons and other things which might be used to assault an officer or effect an escape" and (2) "the

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[4] Petitioner has not argued application of another warrant requirement exception or that the evidence illegally seized would have been inevitably discovered through lawful means. And for good reason – it cannot make the requisite showings. For example, the search here cannot be justified under the "automobile exception," *see United States* v. *Ross*, 456 U.S. 798, 812-13 (1982), because it is undisputed that police did not have probable cause to search respondent's car, JA 134. Nor was the search justified under the plain view doctrine, *Payton* v. *New York*, 445 U.S. 573, 586-87 (1980); there is no record evidence indicating that the evidence seized was in plain view from outside of respondent's car, JA 68. Finally, the search cannot be characterized as an inventory search, *see Colorado* v. *Bertine*, 479 U.S. 367, 371-73 (1987), because police would not have impounded respondent's car but for uncovering evidence during their illegal search, JA 87, 123.

need to prevent the destruction of evidence of the crime-things"). And it likewise has consistently defined the scope of such searches consonant with these two exigency rationales: A search incident to arrest "must be limited to the area 'into which an arrestee might reach.'" *Cupp* v. *Murphy*, 412 U.S. 291, 295 (1973) (quoting *Chimel* 395 U.S. at 763); *Thornton*, 541 U.S. at 620 (Authorities may search only "the person of the arrestee and the area immediately surrounding him."); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 457 n.11 (1971) (Police's authority to search incident to arrest is limited to "only ... the 'arrestee's person and the area "within his immediate control."'").

1. This Court laid down the "proper extent" of a search incident to lawful, custodial arrest in *California* v. *Chimel*, where it invalidated the search following respondent's arrest of his "entire three-bedroom house, including the attic, the garage, and a small workshop." 395 U.S. at 754, 762. Because "'[t]he scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible,'" the *Chimel* Court set forth a rule to ensure that searches incident to arrest are linked to, and do not exceed, the two exigency rationales that render them "imperative" in the first place. *Id.* at 761-62. Recognizing that weapons can be used to effect an assault or escape and evidence can be destroyed or concealed only to the extent they are accessible to the arrestee, this Court held that authorities, incident to lawful, custodial arrest, may search only an arrestee's person and his area of "immediate control – ... mean[ing] the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763 (quotation marks omitted).

2. Following *Chimel*,[5] this Court made clear that the operative time for assessing the exigencies justifying a warrantless search incident to arrest is the time of the search and, accordingly, held that authorities may search only the area that is within the arrestee's immediate control when the search is commenced.[6]

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[5] Shortly after *Chimel*, this Court held in *United States* v. *Robinson*, 414 U.S. 218, 235 (1973), that authority to search an arrestee's person incident to arrest does not depend on a case-by-case assessment of the probability that the arrestee will, in fact, attempt to effect an assault or escape or conceal or destroy evidence. Under *Robinson*, parties need not "litigate[] in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Id.* Thus, the *Robinson* Court held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.*

Robinson was limited to searches of the arrestee's person and did not address whether police may search the area within the arrestee's immediate control if circumstances indicate that there is little probability in a particular arrest situation that weapons or evidence will in fact be found in that area. *See* 3 Wayne R. LaFave, *Search And Seizure: A Treatise On The Fourth Amendment* § 6.3 (4th ed. 2007) ("[T]he question [whether case-by-case justification is required to search an arrestee's area of immediate control] cannot be considered foreclosed by *Robinson*, as the holding there extends only to search of the person, which the Court took care to distinguish from other searches incident to arrest."). But even assuming *Robinson*'s application in this scenario, it would not alter the lawful scope of the search. *See Robinson*, 414 U.S. at 227-28 (Search must be "'strictly circumscribed by the exigencies.'"). Authority to search still would be limited to the area within the arrestee's *immediate* control.

[6] *Chimel* suggested as much. There, this Court explained in setting forth the area of immediate control test that "[a] gun on

In *United States* v. *Chadwick*, 433 U.S. 1, this Court held that a search of an area is invalid under this warrant requirement exception if the arrestee could not conceivably access it when it was searched. There, authorities arrested the defendants as they were loading a footlocker into a car's trunk and searched the footlocker at the stationhouse 90-minutes later. This Court rejected the contention that the warrantless search was incident to the arrests, reasoning that a search is not "incident to th[e] arrest *either* if the search is remote in time or place from the arrest *or* no exigency exists." *Id.* at 15 (internal citation and quotation marks omitted) (emphases added). Because authorities had removed the footlocker to "their exclusive control" before searching it, "there [was] no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence." Thus neither of *Chimel*'s twin exigency rationales justified the search of the footlocker when it was undertaken. *Id.* The same rationales apply squarely here.

Two years later, in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979) this Court confirmed, albeit in *dictum*, that exigent circumstances must justify the search when it is initiated. *Sanders* involved the search of a suitcase within the trunk of a taxicab in which the arrestee was a passenger. This Court concluded that the government rightly had not argued that the warrantless search of the suitcase was justified as an incident to arrest because "it appear[ed] that the bag

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a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." *Chimel*, 395 U.S. at 763. But the gun on a table or in a drawer is dangerous to the arresting officer only if the arrestee possibly can access it; thus a search of the table or drawer is justified under *Chimel* only if it is within the arrestee's immediate control *at the time of the search*.

was not within his 'immediate control' at the time of the search." *Id.* at 764 n.11.

A warrantless search plainly is not "imperative" if there are no exigencies associated with the area to be searched, *Chimel*, 395 U.S. at 761 (Absence of warrant excusable only if "'the exigencies of the situation made that course imperative.'"), as is the case when there is "no longer any danger that the arrestee might gain access to [that area] to seize a weapon or destroy evidence," *Chadwick*, 433 U.S. at 15. Thus, a search incident to arrest must be limited to the "places it would be *possible* for the arrestee *presently* to reach." 3 LaFave, *supra* § 6.3.

B. Authorities May Search The Vehicle's Entire Passenger Compartment When Any Part Of The Car Is Arguably Within The Immediate Control Of Its Recent Occupant.

1. Against this framework, this Court considered in *New York* v. *Belton*, the scope of a search incident to arrest in the "recurring factual situation" of the arrest of a vehicle's recent occupant. 453 U.S. at 460. In *Belton*, a single officer pulled over a vehicle and its four occupants for speeding. Upon smelling burnt marijuana and seeing an envelope marked "Supergold" – which he associated with marijuana – on the car's floor, the officer ordered the four occupants out of the car and placed them under arrest on the highway's shoulder for unlawful possession of marijuana. *Id.* at 455-56. He then "split them up into four separate areas of the Thruway ... so they would not be in physical touching area of each other" but did not restrain the arrestees or secure them in his squad car. *Id.* (internal quotation marks omitted). Thereafter, "[t]he suspects were standing by the side of the car." *Id.* at 457. The

officer searched the vehicle's passenger compartment and found cocaine in the pocket of Belton's jacket, which was in the backseat. *Id.* at 456. Unlike the situation here, the arrestees remained next to the car and unrestrained as the officer searched it. *Id.* at 457.

In considering the search's validity, the Court reaffirmed both the twin exigency rationales underlying and the scope of lawful searches incident to arrest established in *Chimel*. However, because lower "courts ha[d] found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant," *Belton* sought to fashion a straightforward rule that would permit authorities to determine the scope of their authority in this specific "category of cases." *Id.* at 460.

This "category of cases" "suggest[ed] the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Id.* (second alteration in original) (quoting *Chimel*, 395 U.S. at 763). The Court then "read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization" and set forth a bright-line rule – "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* (footnote omitted). It also held that authorities may search containers within the passenger compartment (whether open or closed) because "if the passenger compartment is within

reach of the arrestee, so also will containers in it." *Id.* The vehicle's trunk, however, may not be searched. *Id.* at 460 n.4.

Belton thus established a "bright-line" rule that dispenses with the need for fact-specific inquiries in individual cases into whether particular areas of or objects in the passenger compartment satisfy *Chimel*'s area of immediate control test. But, as noted, this rule applies only to a certain "category of cases" – namely, those in which "'the area within the immediate control of the arrestee' ... arguably includes the interior of an automobile and the arrestee is its recent occupant.'" *Id.* at 460. Because *Belton* made clear that its holding was limited to the "particular and problematic" context at issue and "in no way alter[ed] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests," *id.* at 460 n.3, *Belton* merely created the legal fiction that if some part of the passenger compartment is within a recent occupant's reach, then all of it is within his reach, including any containers therein.

The *Belton* Court upheld the search of the car's entire passenger compartment at issue there because the government had satisfied both conditions triggering application of *Belton*'s bright-line rule. The four arrestees were recent occupants – they had occupied the vehicle immediately before their arrests and the search. Moreover, the car was "within the area which we have concluded was 'within the arrestee's immediate control' within the meaning of the *Chimel* case." *Id.* at 462. This conclusion is unsurprising given that the arrestees stood unrestrained, next to the car during the search and thus the car was conceivably accessible to them when the officer searched it.

2. Most recently, in *United States* v. *Thornton*, this Court considered *Belton*'s application in situations where police initiate contact with the arrestee after the latter has exited the car. *Thornton* involved the arrest of a suspect who had exited his car immediately before and was still in "'close proximity'" to it when police confronted him. *Thornton*, 541 U.S. at 619.

The Court began its analysis with *Belton* and confirmed its analytic foundation on *Chimel*. It noted that *Belton* searches, like *Chimel* searches, are based on "the need to remove any weapon the arrestee might seek to use to resist arrest or to escape, and the need to prevent the concealment or destruction of evidence." *Id.* at 620. It also reiterated the long-standing rule on the scope of such searches: Authorities may search only "the person of the arrestee and the area immediately surrounding him." *Id.*

Critical in this case, *Thornton* acknowledged *Belton*'s central holding that "the entire passenger compartment may be searched *when* '"the area within the immediate control of the arrestee" ... arguably includes the interior of an automobile *and* the arrestee is its recent occupant.'" *Id.* at 623 n.3 (omission in original) (emphases added) (quoting *Belton*, 453 U.S. at 460). This Court explained that the *Belton* rule dispensed with the need for "police officers and courts ... to determine whether a particular object within the passenger compartment was also within an arrestee's reaching distance under *Chimel*" when "the car itself was within the arrestee's reaching distance under *Chimel*." *Id.* *Thornton*, thus, confirmed that the *Belton* rule, authorizing a search of the car's entire passenger compartment and containers therein, is triggered when (1) the car is

arguably within the arrestee's immediate control and (2) the arrestee is its recent occupant.

Thornton addressed only the second trigger – the meaning of "'recent occupant.'" Thornton argued that the *Belton* rule applied only when authorities signal confrontation with the suspect while he is in the car. This Court rejected Thornton's proposed test, holding that *Belton* may apply in situations "when [an] officer first makes contact with the arrestee after the latter has stepped out of his vehicle," so long as the arrestee is a "'recent occupant,'" which "may turn on his temporal or spatial relationship to the car at the time of the arrest and search." *Id.* at 617, 622. The court found the arrest of someone inside the car versus someone "who is next to a vehicle" to be a distinction without a difference because both situations "present[ ] identical concerns regarding officer safety and the destruction of evidence." *Id.* at 621. It reasoned that "an arrestee [is no] less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle." *Id.*

Thornton did not address *Belton*'s first trigger – whether the car arguably was within Thornton's immediate control – because Thornton did not raise this issue. He did not advance the argument that the warrantless search of his car was not incident to arrest because his conceivable access to it was foreclosed after he had been secured in a squad car.[7] The *Thornton* Court thus addressed only the narrow

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[7] Actually, Thornton conceded otherwise at oral argument, when his counsel stated that it was of no moment that Thornton was secured in a squad car at the time of the search, Tr. of Oral Argument at 7, *Thornton*, 541 U.S. 615 (argued Mar. 31, 2004) (No. 03-5165).

question presented: "'Whether the bright-line rule announced in *New York* v. *Belton* is confined to situations in which authorities initiate contact with the occupant of a vehicle while that person is in the vehicle'" – a point which it took pains to confirm throughout the decision. *Thornton*, 541 U.S. at 624 n.4 (alteration omitted) (plurality declining to consider issue that was "'not fairly encompass[ed]'" by "[t]he question presented"); *id.* at 622 n.2 (declining to address argument that was "outside the question on which we granted certiorari and was not addressed by the Court of Appeals" (citation omitted)).

In fact, in *Thornton*, five Members of this Court expressed serious doubts that *Belton*'s bright-line rule could justify vehicle searches undertaken after the foreseeable risk of the arrestee gaining access to the passenger compartment had been foreclosed. Justice Scalia, joined by Justice Ginsburg, concluded that to uphold such searches under the guise of *Belton* "stretche[d] [*Belton*] beyond its breaking point." *Thornton*, 541 U.S. at 625 (Scalia, J. concurring in judgment). Justice O'Connor separately concurred to express her "dissatisfaction with the state of the law in this area," in particular that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." *Id.* at 624 (O'Connor, J., concurring). Finally, Justice Stevens, joined by Justice Souter, lamented the lack of a "limiting principle" to the *Belton* doctrine as it has been construed. *Id.* at 636 (Stevens, J., dissenting).

C. Petitioner Has Not Met Its Burden Of Proving The Warrantless Search Of Respondent's Car Was Incident To His Arrest.

Because petitioner seeks to justify the warrantless search of respondent's car as incident to his arrest, it must prove that the areas searched were within respondent's immediate control when police initiated the search. Under the *Belton* rule, petitioner need not prove that every place and object within the passenger compartment of respondent's car was within his immediate control at the time of the search so long as it shows that that respondent was a recent occupant of the car *and* the car's passenger compartment was arguably within his immediate control – that is, it was possible for respondent to reach some part of the car at the time of the search. *Thornton*, 541 U.S. at 623 n.3 ("[T]he entire passenger compartment may be searched *when* 'the area within the immediate control of the arrestee ... arguably includes the interior of an automobile and the arrestee is its recent occupant.'" (omission in original) (emphasis added)).

Petitioner cannot meet this burden. No part of respondent's car was conceivably accessible to him when police initiated the search in this case. By that time, police had immobilized respondent, having handcuffed and secured him in the back of a locked squad car (an area modified to preclude escape) where he was being watched by another armed officer. Indeed, the officers on scene acknowledged that there was no reasonable possibility that respondent could escape from the squad car and that his car was not conceivably accessible to him when they initiated the search. JA 77, 80, 119, 121. They deemed the scene secure at this point. JA 120-21. In

short, when police searched the car, there was "no longer any danger that [respondent] might gain access to [his car] to seize a weapon or destroy evidence." *Chadwick*, 433 U.S. at 15. The passenger compartment was plainly not an area "from within which he might [have] gain[ed] possession of a weapon or destructible evidence," *Chimel*, 395 U.S. at 763; as such, when the search was initiated "no exigency exist[ed]," *Chadwick*, 432 U.S. at 15.[8] Therefore, the search of respondent's car was not incident to his arrest, as it did not serve to mitigate either of *Chimel*'s twin exigency rationales.

II. PETITIONER'S AND ITS *AMICI*'S CONSTRUCTION OF *BELTON* IS FUNDAMENTALLY AT ODDS WITH THE FOURTH AMENDMENT.

Petitioner and its *amici* advance a construction of *Belton* that would authorize authorities to search a recent occupant's vehicle where there is no possibility of the arrestee obtaining a weapon or evidence from the car, so long as the search is "'roughly contemporaneous with the arrest'" and occurs as part of a "'continuous sequence events.'" U.S. Br. 15-16. They, thus, would uphold every warrantless vehicle search incident to a recent occupant's arrest unless "'the arrest and search are so separated in time or by intervening acts that the latter cannot be said to have been incident to the former.'" Pet. Br. 28; U.S. Br. 15-16, 29-30. In this case, they argue that the search

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[8] Petitioner does not contend that the entire passenger compartment was within White and Porras's area of immediate control at the of the search (or at any time during the encounter). Nor could it. White and Porras, like respondent, were secured in squad cars at the time of the search, and therefore no part of respondent's car was conceivably accessible to either of them.

of respondent's car was lawful because "[m]oments after respondent exited his vehicle, the police arrested him and promptly searched that vehicle in one continuous process." U.S. Br. 8.

As an initial matter, petitioner and its *amici*'s proposed test simply cannot be squared with either the principles and reasoning of *Belton* or any reasonable understanding of fundamental Fourth Amendment protections. They present precisely the argument for significantly extending *Belton*'s reach that troubled a majority of the Justices in *Thornton*.

As noted above, the *Belton* Court made clear that it had set forth a bright-line rule to establish a "workable definition of 'the area within the immediate control of the arrestee' *when that area arguably includes the interior of an automobile* and the arrestee is its recent occupant." *Belton*, 453 U.S. at 460 (emphasis added). Petitioner and its *amici* wholly ignore this conjunctive requirement. The Court's language in *Thornton* does not alter that requirement in any way: "[T]he entire passenger compartment may be searched *when* '"the area within the immediate control of the arrestee" ... arguably includes the interior of an automobile *and* the arrestee is its recent occupant,'" *Thornton*, 541 U.S. at 623 n.3 (omission in original) (emphases added) (quoting *Belton*, 453 U.S. at 460). Indeed, only if the arrestee's area of immediate control arguably includes the car's passenger compartment is the generalization on which the *Belton* rule depends generally true. See *infra* § III. That is, only if some part of the vehicle is conceivably within the arrestee's reach are the "articles inside the relatively narrow compass of the passenger compartment of an automobile ... in fact generally, even if not inevitably, within 'the area into which an arrestee might reach

in order to grab a weapon or evidentiary ite[m].'" *Belton*, 453 U.S. at 460 (alteration in original) (quoting *Chimel*, 395 U.S. at 763).

Petitioner and its *amici* cannot avoid the consequence that their construction would permit warrantless vehicle searches in situations, like the one here, that are devoid of any exigency. This construction is contrary to this Court's frequent admonitions that a warrantless search is reasonable "only when an exigency makes [it] imperative." *Illinois* v. *Rodriguez*, 497 U.S. 177, 191-92 (1990). Indeed, their test grants authorities a continuing right to search based solely on the fact that the vehicle earlier, even if no longer, was within the arrestee's immediate control. Petitioner and its *amici* ask this Court to ignore the circumstances as they exit at the time of the search and focus instead on those that existed in the past – at the time of arrest. As such, they seek to convert the operative time for assessing the exigencies from the time of the search to the time of the arrest. It is of no moment to this Court's Fourth Amendment analysis, however, that a car earlier was within the arrestee's immediate control. A warrantless search is not rendered reasonable merely because it occurred in close proximity to the time when and place where exigencies existed. It is well-settled Fourth Amendment law that the exigencies are adjudged at the time of the search.[9]

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[9] With exigency-based exceptions to the warrant requirement, this Court has made clear that the exigent circumstances are always assessed at the time of the search. *See Mincey* v. *Arizona*, 437 U.S. 385 (1978) (Subsequent searches of home are unlawful because no exigencies justified the warrantless entry.); *Ker* v. *California*, 374 U.S. 23, 40 n.12 (1963) ("It goes without saying that in determining the lawfulness of entry and the

In this light, a search must be justified by *Chimel*'s twin exigency rationales when it is commenced and thus must be limited to the areas into which the arrestee conceivably could reach at that time. This Court has repeatedly said so in the specific context of searches incident to arrest, see, *e.g.*, *Sanders*, 442 U.S. at 763-64 n.11, and many federal and state appellate courts decisions are in accord, holding that authorities may search only the area under the arrestee's immediate control at the time of the search.[10] In *United States* v. *Lyons*, for example, the

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existence of probable cause we may concern ourselves only with what the officers had reason to believe *at the time of their entry*."). The lower courts are in accord. *See, e.g., Fisher* v. *City of San Jose*, 509 F.3d 952, 961 n.8 (9th Cir. 2007) ("[I]n the criminal law enforcement context, exigent circumstances are always assessed at the time of the search."), *reh'g granted*, 519 F.3d 908 (9th Cir. 2008); *Cabell* v. *Rousseau*, 130 F. App'x 803, 806 (7th Cir. 2005) ("[E]xigent circumstances are measured at the time of the search."); *United States* v. *Hardy*, 52 F.3d 147, 149 (7th Cir. 1995) ("However, the Supreme Court has carved out several exceptions to the warrant requirement, including where 'exigent circumstances' exist at the time of search.").

[10] *See, e.g., United States* v. *Johnson*, 16 F.3d 69, 71-73 (5th Cir. 1994) (assessing arrestee's area of immediate control at the time of search); *United States* v. *McConnell*, 903 F.2d 566, 570 (8th Cir. 1990) (same); *United States* v. *Bonitz*, 826 F.2d 954, 956 (10th Cir. 1987) (same); *United States* v. *Cueto*, 611 F.2d 1056, 1062 (5th Cir. 1980) (same); *United States* v. *Berenguer*, 562 F.2d 206, 210 (2d Cir. 1977) (same); *United States* v. *Mapp*, 476 F.2d 67, 79-80 (2d Cir. 1973) (same); *United States* v. *Baca*, 417 F.2d 103, 105 (10th Cir. 1969) (same); *People* v. *Summers*, 86 Cal. Rptr. 2d 388, 389-90 (Cal. Ct. App. 1999) (same); *State* v. *LaMay*, 103 P.3d 448 (Idaho 2004) (same); *Stackhouse* v. *State*, 468 A.2d 333, 342 (Md. 1983) (same); *State* v. *Vittellone*, 453 A.2d 894, 896 (N.J. Super. Ct. App. Div. 1982) (same); *State* v. *Cook*, 332 S.E.2d 147, 155 (W. Va. 1985) (same). *But see United States* v. *Abdul-Saboor*, 85 F.3d 664, 668-69 (D.C. Cir. 1996) (assessing arrestee's area immediate control at the time of

D.C. Circuit, in an opinion joined by then-Judge Scalia, held: "To determine whether a warrantless search incident to an arrest exceeded constitutional bounds, a court must ask: was the area in question, *at the time it was searched*, conceivably accessible to the arrestee – assuming that he was neither 'an acrobat [nor] a Houdini'?" 706 F.2d 321, 330 (footnote omitted) (emphasis added) (alteration in original) (quoting *United States* v. *Mapp*, 476 F.2d 67, 80 (2d Cir. 1973)).

To advance their construction of *Belton*'s bright-line rule, petitioner and its *amici* focus on a single sentence in *Belton* – "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton*, 453 U.S. at 460 (footnote omitted). This singular language cannot hold the weight petitioner and its *amici* place on it. Even reading this sentence in isolation (as they ask this Court to do), vehicle searches are valid only if conducted "as a contemporaneous incident of th[e] arrest." *Id.* Although they concede that this language imposes a limitation, they dismiss it as merely prohibiting searches that are "so separated in time or by intervening acts that the latter cannot be said to have been incident to the former." Pet. Br. 28 (internal quotation marks omitted). This dismissal erroneously ignores this Court's settled cases that demonstrate that a search is "incident" to arrest only if it serves to mitigate the exigencies naturally appertaining to the arrest.

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arrest but concluding search is not incident to arrest if arrestee is "'immobilized' so that the area to be searched is not 'conceivably accessible' to him" at time of search).

This Court's decisions, including *Preston* v. *United States*, 376 U.S. 364 (1964), and *Chadwick*, have consistently interpreted the "incident" proviso as requiring a nexus between the search and the exigency rationales underlying this warrant requirement exception. The United States attempts to explain these cases as supporting its proposed test, U.S. Br. 15, but it misses the forest through the trees. Although *Chadwick* and *Preston* identify spatiotemporal proximity as a relevant consideration, both cases were decided on a broader principle – that a search is not "incident" to arrest if "the[] [exigency] justifications are absent." *Preston*, 376 U.S. at 367. Therefore, in *Preston*, the vehicle search, which occurred after the arrestees were in custody and the vehicle was moved to the stationhouse, was invalid because "there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime." *Id.* at 368.

In *Chadwick*, the Court unequivocally held that a search is not "incident to th[e] arrest ... if ... no exigency exists." 433 U.S. at 15. The search at the stationhouse was not incident to arrest because "no exigency exist[ed]" – that is, "there [was] no longer any danger that the arrestee might gain access to [the footlocker] to seize a weapon or destroy evidence." *Id.*

The principle court of appeals decision on which petitioner and its *amici* rely, see Pet. Br. 28 & n.3; U.S. Br. 16, in arguing for their expansion of the *Belton* rule, *United States* v. *Abdul-Saboor*, 85 F.3d 664 (D.C. Cir. 1996), actually cuts against them. There, the D.C. Circuit concluded that, if "when the search occurs, the arrestee has been 'immobilized' so that the area to be searched is not 'conceivably

accessible' to him, then the search is no longer incident to his arrest." *Id.* at 669. In an effort to illustrate the limits to their approach, petitioner and its *amici* cite with approval several lower court decisions that invalidated *Belton* searches conducted after the arrestee's removal from the scene. Pet. Br. 28; U.S. Br. 29 & n.3. They contend that these decisions support their spatiotemporal proximity test. Yet searches in this circumstances are not invalid solely because of isolated considerations of place or time. Again, such a construction flatly ignores the broader exigency principles at work. Thus, for example, a vehicle search conducted after the arrestee has been removed from the scene is invalid because "the arrestee's removal from the scene foreclose[s] any possibility that he could reach for an article within the vehicle." *State* v. *Badgett*, 512 A.2d 160, 169 (Conn. 1986).

Ultimately, the construction of *Belton* petitioner and its *amici* press here would permit warrantless vehicle searches in virtually all situations involving a recent occupant's arrest, even when those situations are entirely divorced from the exigent justifications upon which the search incident to arrest exception rests. The only point of limitation they concede is to require a spatiotemporal nexus between the search and the arrest, which, in practice, is no limitation at all. This proposed spatiotemporal proximity test is nothing more than a rule of convenience that grants authorities unfettered discretion to conduct vehicle searches. This position is a radical departure from *Chimel* that greatly expands police authority to conduct warrantless searches by divorcing that authority from any reasonable conception of the suspect's "area of immediate control." Petitioner and its *amici* proposed rule turns Fourth Amendment law

on its head: Rather than being *per se* unreasonable, warrantless vehicle searches are presumed to be permissible whenever a recent occupant is arrested, subject only to the two "limitations" of attenuated time and/or distance. "But conducting a *Chimel* search is not the Government's right; it is an exception – justified by necessity – to a rule that would otherwise render the search unlawful." *Thornton*, 541 U.S. at 627 (Scalia, J. concurring in judgment).

III. THE EXIGENCIES PETITIONER IDENTIFIES TO JUSTIFY THE SEARCH OF RESPONDENT'S CAR ARE ILLUSORY.

Given the constitutional infirmity of their interpretation of the *Belton* rule, petitioner and its *amici* are left to argue that exigencies justified the search of respondent's car. They, first, make the counterintuitive argument that an arrestee's vehicle is conceivably within his immediate control when he is handcuffed and secured in a locked police cruiser. Pet. Br. 24-25; U.S. Br. 22-23; States Br. 29. In this case, they contend that it was possible for respondent to slip free of his handcuffs or, with his hands bound behind his back, break out of the locked squad car, bypass five presumably armed police officers, one of whom was stationed immediately outside the squad car, bolt to his automobile, and secure a weapon or destructible evidence therein. This scenario is "remote in the extreme." *Thornton*, 541 U.S. at 625 (Scalia, J. concurring in judgment). This Court should not credit this wholly speculative and fanciful rationale, which necessarily presumes respondent is "superhuman," *United States* v. *Vasey*, 834 F.2d 782, 787 (9th Cir. 1987), "an acrobat [and] a Houdini," *Lyons*, 706 F.2d at 330 (internal quotation marks omitted), and "Hercules," *United States* v. *Frick*, 490

F.2d 666, 673 (5th Cir. 1973) (Goldberg, J. concurring in part and dissenting in part), rolled into one, and which directly contradicts the testimonies of officers on scene. When "the arrestee [i]s handcuffed and secured in a patrol car before the police conduct[] the search, the rational underpinnings of *Belton* – officer safety and preservation of evidence – are not implicated." *United States* v. *Weaver*, 433 F.3d 1104, 1107 (9th Cir.), *cert. denied*, 547 U.S. 1142 (2006); see *Vasey*, 834 F.2d at 787 (Given that arrestee "remained handcuffed in the rear of the police vehicle," "[i]t was readily apparent to the officers and to this court that Vasey had virtually no opportunity to reach into his vehicle as the time the search occurred.").[11]

Petitioner's and its *amici*'s argument rests on the contention that "strange things happen," Pet. Br. 25, but tellingly, they have not pointed to a single example in which "strange things" of this nature have actually happened: They have not cited a single instance in which a restrained arrestee escaped from a locked squad car and retrieved a weapon or destructible evidence from a vehicle. See Pet. Br. 24-25; U.S. Br. 22-23; States Br. 29. Their "inability to come up with even a single example of a handcuffed arrestee's retrieval of arms or evidence from his vehicle undermines [their] claims."[12] *Thornton*, 541

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[11] *See* cases cited, *supra* n.10.

[12] As Justice Scalia explained in *Thornton*:

> The risk that a suspect handcuffed in the back of a squad car might escape and recover a weapon from his vehicle is surely no greater than the risk that a suspect handcuffed in his residence might escape and recover a weapon from the next room—a danger we held insufficient to justify a search in *Chimel*, *supra*, at 763.

Thornton, 541 U.S. at 627 (Scalia, J. concurring in judgment).

U.S. at 626-27 (Scalia, J. concurring in judgment). But even if they could point to one anecdotal incident of superhuman behavior, it would be inappropriate and odd to define Fourth Amendment boundaries for arrests on the basis of the rarest case.

Second, although they contend the warrantless search of respondent's car was justified as a search incident to arrest, petitioner and its *amici* next resort to an argument that has no basis in *Chimel*. They maintain that the search here was rendered imperative because of the security threat that hypothetical, unseen third parties posed to police.[13] Pet. Br. 26; U.S. Br. 24; States Br. 26-27. But *Chimel* and its progeny, including *Belton* and *Thornton*, identified only two exigency rationales for the search incident to arrest exception, and the threat posed by hypothetical confederates was not among them. As this Court noted, "the justification for the search incident to arrest considered in *Chimel* was the threat *posed by the arrestee*, not the safety threat posed by ... unseen third parties."[14] *Buie*, 494 U.S. at 336 (emphasis added).

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[13] This argument is an obvious red herring. There is no record evidence indicating the presence of anyone on scene except for White and Porras, who were in custody and secured when respondent arrived on scene. Rather, this argument is based again on mere speculation that the residence's owner *could have* returned during the confrontation.

[14] The only authority petitioner and its *amici* cite in support of their proposed expansion of *Chimel*'s exigency rationales is *dictum* contained in a footnote in *United States* v. *Doward*, 41 F.3d 789, 793 n.5 (1st Cir. 1994) (noting "such considerations are not determinative"). But their reliance on *Doward* is misguided. That case addressed the exigencies posed, not by unseen, but actual third-parties at the scene. There, a passenger in the arrestee's vehicle and a "gathering crowd" were at the scene, and the passenger was in close proximity to the

What is more, this Court already has recognized a warrant requirement exception based on the exigency posed by unseen third parties and identified its constitutionally permissible scope in *Maryland* v. *Buie*. There, the Court held that authorities may engage in a "protective sweep" – that is, "a quick and limited" "cursory visual inspection of those places in which a person might be hiding" "conducted to protect the safety of police officers and others" – of the "spaces immediately adjoining the place of arrest." *Id.* at 327, 335. Far from authorizing a full-blown search for weapons of any area to which an unseen third-party might gain access, the *Buie* Court held that the threat posed by unseen third-parties warranted only a "cursory inspection of those spaces where a person may be found," not "a full search of the premises." *Id.* at 335. As such, the top-to-bottom search of the entire passenger compartment of respondent's car cannot be justified on the exigency on which petitioner and its *amici* now (for the first time) claim it was based.

IV. IF PETITIONER CORRECTLY INTERPRETS *BELTON*, SPECIAL JUSTIFICATIONS WARRANT LIMITING *BELTON*'S HOLDING.

If this Court agrees with petitioner and its *amici* that *Belton* authorizes police to search a car whenever the arrestee is its recent occupant, then this Court should reevaluate *Belton*'s bright-line rule. Commentators[15] and many judges[16] have questioned

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vehicle during the arrest and search. *See id.* By contrast, here, no one was in close proximity to respondent's car when it was searched, nor was there anyone else at the scene (except, as noted, White and Porras who were already in custody).

[15] *See, e.g.*, David S. Rudstein, Belton *Redux: Reevaluating* Belton's *Per Se Rule Governing the Search of An Automobile*

Incident To Arrest, 40 Wake Forest L. Rev. 1287, 1330 (2005) ("[T]he particular per se rule [*Belton*] adopted is based upon a 'considerable overgeneralization.' As a result, for over twenty years police officers have lawfully conducted thousands of searches of automobiles and their contents that cannot be justified by either of the twin rationales of *Chimel* – the need to prevent the arrestee from reaching a weapon or an item of evidence." (footnote omitted)); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 274 (1984) ("If any bright line rule had been necessary to resolve issue in *Belton*, it would have been the opposite of the rule that the Court announced."); David S. Rudstein, *The Search of an Automobile Incident to an Arrest: An Analysis of* New York v. Belton, 67 Marq. L. Rev. 205, 261 (1984) (urging return to *Chimel* rule); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307, 329 (1982) ("Any survey of the relevant cases will indicate a number of commonplace events which would put the passenger compartment beyond the arrestee's control – immediate removal of him to a patrol car or some other place away from his own vehicle, handcuffing the arrestee, closure of the vehicle, and restraint of the arrestee by several officers, among others." (footnotes omitted)).

[16] *See, e.g., United States* v. *Hrasky*, 453 F.3d 1099, 1108 n.5 (8th Cir. 2006) ("As law enforcement and reviewing courts continue to be called upon to apply *Belton*, its bright-line rule may become increasingly less illuminating, especially in close cases such as this."), *cert. denied*, 127 S. Ct. 2098 (2007); *United States* v. *White*, 131 F. App'x 54, 57 n.2 (6th Cir. 2005) ("Justices and commentators alike have frequently pointed out that this generalization may well be incorrect, observing that it is unlikely that an individual who is almost certain to be arrested and handcuffed outside of a vehicle will be able to gain access to its passenger compartment in order to grab a weapon or destroy evidence."); *Weaver*, 433 F.3d at 1107 ("We respectfully suggest that the Supreme Court may wish to re-examine" *Belton*'s application in situations like the one here); *United States* v. *Osife*, 398 F.3d 1143, 1147 (9th Cir. 2005) (questioning *Belton*'s analytical soundness because it "relies on the legal fiction that a suspect handcuffed and locked in a patrol car might escape and grab a weapon from the passenger compartment of his own car"); *United States* v. *Barnes*, 374 F.3d 601, 605 (8th Cir. 2004)

the constitutional moorings of *Belton*'s bright-line rule in circumstances like the ones that obtain here. And, as noted, in *Thornton*, five Justices expressed serious discontent with the development of *Belton* beyond its facts. See, *e.g.*, *Sandin* v. *Conner*, 515 U.S. 472, 483 (1995) (Where due process methodology had "strayed from the real concerns undergirding the liberty protected by the Due Process Clause," this Court abandoned it and "return[ed] to the due process principles we believe were correctly established and applied in [earlier cases].").[17]

(Smith, J., dissenting) ("I share the concern expressed by Justices O'Connor and Scalia in *Thornton* that some may view a search incident to an arrest as 'a police entitlement.'"); *United States* v. *McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring) ("[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles."); *State* v. *Hernandez*, 410 So. 2d 1381, 1385 n.2 (La. 1985) (Cooper, J., concurring) ("The *Belton* rule has been incisively criticized a creating the risk that police will make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits."); *Rainey* v. *Commonwealth*, 197 S.W.3d 89, 95 (Ky. 2006) (Smith, J. dissenting) ("In my view (and that of five members of the Court that decided *Thornton*), the reasoning supporting this departure from previously settled law with respect to automobile searches is seriously flawed."), *cert. denied*, 127 S. Ct. 1005 (2007).

[17] This Court technically need not overrule any of its holdings in prior cases. Both *Belton* and *Thornton* held that the searches at issue were reasonable and hence lawful under the Fourth Amendment. In both cases, police had probable cause to believe that evidence was in the car, and hence the warrantless searches in *Belton* and *Thornton* fell under the "automobile exception" to the warrant requirement. *See Belton*, 453 U.S. at 463 (Stevens, J., concurring) (noting applicability of the automobile exception).

A. *Belton*'s Generalization Is Empirically False.

The *Belton* rule, like all *per se* rules, required this Court to make a broad generalization. *Coleman* v. *Thompson*, 501 U.S. 722, 737 (1991) ("'*Per se* rules ... require the Court to make broad generalizations." (omission in original) (quoting *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977)). Specifically, it made "the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Belton*, 453 U.S. at 460 (alteration in original) (quoting *Chimel*, 395 U.S. at 763). The *Belton* Court then construed *Chimel*'s "immediate control" test "in light of that generalization" and fashioned its bright-line rule. It believed that it had set forth a rule, "'which, *in most instances*, ma[de] it possible to reach a *correct determination* beforehand as to whether an invasion

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At any rate, the doctrine of stare decisis would not justify continued adherence to the *Belton* rule. "In constitutional questions, where correction depends upon amendment and not upon legislative action," such as the case here, "this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith* v. *Allwright*, 321 U.S. 649, 665 (1944). Indeed, stare decisis is not an "inexorable command," but rather a "principle of policy." *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). As such, this Court will depart from stare decisis "'to bring its opinions into agreement with experience,'" *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986), and when its opinions are "insusceptible of principled application," *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting). In short, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne*, 501 U.S. at 827 (quoting *Smith*, 321 U.S. at 665).

of privacy is justified in the interest of law enforcement.'" *Id.* at 458 (emphases added) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. Ct. Rev. 127, 142).

Such a bright-line rule is an anomaly in this Court's Fourth Amendment jurisprudence. The Court has admonished that "Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations." *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 238 n.5 (1986). "[F]or the most part *per se* rules are inappropriate in the Fourth Amendment context," *United States* v. *Drayton*, 536 U.S. 194, 201 (2002), and the Court has, therefore, "consistently eschewed bright-line rules," *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996).

Of bright-line rules generally, the Court has noted: "*Per se* rules should not be applied, however, in situations where the generalization *is incorrect as an empirical matter*; the justification for a conclusive presumption disappears *when application of the presumption will not reach the correct result most of the time.*" *Coleman*, 501 U.S. at 737 (emphases added); see *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977) ("Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them."). A bright-line rule, thus, can be countenanced only if the generalization on which it is based is true in the majority of the cases it encompasses.

The *Belton* rule (under this construction) does not meet this standard – the generalization on which it depends has proven to be *empirically false*. The presumption that a vehicle's recent occupant

generally is capable of reaching into the interior of the car is a "considerable overgeneralization." *Richards* v. *Wisconsin*, 520 U.S. 385, 393-94 (1997) (rejecting as a "considerable overgeneralization" a bright-line rule based upon a presumption that every drug investigation poses substantial risks to officers).

In most cases, a car's recent occupant cannot, in fact, access the passenger compartment for a weapon or destructible evidence. Authorities routinely handcuff and subdue arrestees immediately upon arrest and before initiating a vehicle search "incident" to arrest. Reported cases involving this situation are "legion." *Thornton*, 541 U.S. at 628 (Scalia, J. concurring in judgment) (citing cases).[18] A recent empirical study confirms what is manifest from these cases – that it is *standard practice* for authorities to handcuff and secure the arrestee *before* undertaking a search "incident" to arrest. See Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 Wis. L. Rev. 657, 665-66.

The commonplace practice of securing the arrestee in a police cruiser plainly puts the passenger compartment beyond the arrestee's "immediate control." See *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986) (This Court departs from stare decisis when necessary "'to bring its opinions into agreement with experience.'"). The *Belton* rule, thus, does not, "in most instances, ... reach a correct determination beforehand as to whether an invasion of privacy is

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[18] The pile only has grown higher since Justice Scalia made this observation in 2004. *See, e.g.*, *United States* v. *Nichols*, 512 F.3d 789 (6th Cir. 2008); *United States* v. *Mapp*, 476 F.3d 1012 (D.C. Cir.), *cert. denied*, 127 S. Ct. 3031 (2007); *Hrasky*, 453 F.3d 1099; *Weaver*, 433 F.3d 1104.

justified in the interest of law enforcement." *Belton*, 453 U.S. at 458 (internal quotation marks omitted). Because the passenger compartment is almost always outside a recent occupant's reaching distance during the search, "application of the presumption [in *Belton*] will not reach the correct result most of the time." *Coleman*, 501 U.S. at 737. That is, the *Belton* rule seldom produces results that mirror those that would obtain under an accurate case-by-case application of *Chimel*. See 3 LaFave, *supra* § 7.1 (noting bright-line rules in the Fourth Amendment context should "approximate the results which would obtain from correct case-by-case application of the principle" and concluding that the *Belton* rule "appear[s] to produce results unsupportable by the applicable principle"). *Belton* thus authorizes many searches that otherwise would be unconstitutional. See *supra* § I.A.

B. Petitioner's Embrace Of The Post-*Belton* Rule Does Not Eliminate Line Drawing Inquiries.

Petitioner and its *amici* suggest that *Belton*'s frequent misfires should be excused because of the benefits its bright-line rule provides. Pet. Br. 29-32; U.S. Br. 28-29. But any supposed benefits are not sufficient of themselves to justify a bright-line rule. If it were otherwise, all of Fourth Amendment law would be supplanted by rigid application of *per se* rules. Cf. *Continental T. V., Inc.*, 433 U.S. at 50 n.16 (providing guidelines and minimizing burdens on litigation and the judicial system "are not sufficient in themselves to justify the creation of per se rules"). Indeed, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978).

Moreover, in practice, *Belton*'s bright-line rule has proven to be far less illuminating than petitioner and its *amici* suggest. See *Belton*, 453 U.S. at 469 (Brennan, J. dissenting) (The *Belton* rule "leave[s] open too many questions and, more important, it provides the police and the courts with too few tools with which to find the answers."). As the case law giving rise to *Thornton* demonstrates, the phrase "recent occupant" is susceptible to varying interpretations. *Compare United States* v. *Hudgins*, 52 F.3d 115, 119 (6th Cir. 1995) (holding *Belton* did not apply when arrestee voluntarily exited car before authorities contacted him), *United States* v. *Strahan*, 984 F.2d 155, 159 (6th Cir. 1993) (same), *United States* v. *Fafowora*, 865 F.2d 360, 362 (D.C. Cir. 1989) (same), *Thomas* v. *State*, 761 So. 2d 1010, 1011-13 (Fla. 1999), *and People* v. *Stehman*, 783 N.E.2d 1, 6 (Ill. 2002) (same), *with United States* v. *Thornton*, 325 F.3d 189 (4th Cir. 2003) (holding *Belton* may apply when arrestee voluntarily exited car before authorities contacted him), *aff'd*, 541 U.S. 615 (2004), *United States* v. *Sholola*, 124 F.3d 803, 817 (7th Cir. 1997) (same), *and United States* v. *Snook*, 88 F.3d 605, 606-08 (8th Cir. 1996). Indeed, even after *Thornton*, the courts have struggled in applying this Court's instruction that recent occupant status "*may* turn on [the arrestee's] temporal or spatial relationship to the car at the time of the arrest and search." [19] *Thornton*, 541 U.S. at 622 (emphasis

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[19] *See, e.g.*, *United States* v. *Fields*, 456 F.3d 519, 522 (5th Cir. 2006) ("[T]he *Thornton* Court 'never specified the physical distance between the defendant and his car at the time he was arrested' that would constitute a 'recent occupant.'"); *United States* v. *Palmer*, 206 F. App'x 357, 359 (5th Cir. 2006) ("The majority in *Thornton* does not precisely define the term 'recent occupants' other than to remark that 'the arrest of a suspect who

added). Since *Thornton*, the questions of "how recent is recent, [and] how close is close," *Id.* at 636 (Stevens, J., dissenting), have been frequently litigated in the lower courts, which have reached disparate results.[20] In addition, given *Thornton*'s precatory language, other, different questions also

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is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.'"), *cert. denied*, 128 S. Ct. 39 (2007); *United States* v. *Jones*, 155 F. App'x 204, 207 (6th Cir. 2005) ("The Court expressly declined to define the term ... ['recent occupant'], and ... the Court never specified the physical distance between the defendant and his car at the time he was arrested or the amount of time that had elapsed since he had exited his car." (citations omitted)), *cert. denied*, 547 U.S. 1029 (2006); *Rainey*, 197 S.W.3d at 94-95 ("Thus courts are left with little guidance in determining an arrestee's status as a "recent occupant....' [T]here is no hard and fast definition of what constitutes 'recent' both in time and distance.").

[20] As to spatial proximity between the arrestee and the car, *compare United States* v. *Arango*, 879 F.2d 1501, 1506 (7th Cir. 1989) (upholding search where arrestee was one block from car), *Rainey*, 197 S.W.3d at 95 (upholding search where arrestee was 50-feet from vehicle), *and Cason* v. *Commonwealth*, 530 S.E.2d 920, 922, 924 (Va. Ct. App. 2000) (upholding search where arrestee was 50-75-feet from vehicle), *with Strahan*, 984 F.2d at 159 (rejecting search where arrestee was 30-feet from car), *and United States* v. *Garcon*, No. 07-80051-CR, 2008 WL 60405, at *11 (S.D. Fla. Jan. 3, 2008) (rejecting search where arrestee was six-feet from car), *and State* v. *Rathbun*, 101 P.3d 119, 121 (Wash. Ct. App. 2004) (rejecting search where arrestee was 40-60-feet from car). As to temporal proximity between the arrestee and the car, *compare Mack* v. *City of Abilene*, No. Civ. A. 104CV050C, 2005 WL 1149807, at *10 (N.D. Tex. May 12, 2005) (upholding search where arrestee had not been in the car for over three hours), *partially vacated on other grounds*, 461 F.3d 547, 552–53 (5th Cir. 2006), *with United States* v. *Laughton*, 437 F. Supp. 2d 665, 673 (E.D. Mich. 2006) (rejecting search where arrestee "had not been near the vehicle for at least thirty minutes by the time the officers even arrived at the scene").

arise, such as whether spatial proximity applies to an arrestee about to get *into* his car. Tr. of Oral Argument at 47, *Thornton*, 541 U.S. 615 (2004) (No. 03-5165).

The only other limitation imposed under this construction of *Belton* is that the search be conducted "contemporaneous[ly]" with the arrest – a component of the supposed bright line rule that has also perplexed courts and resulted in discrepancies. The case-specific issues invited here are obvious. One court, for example, has found 30-to-40 minutes to be too long, see *Vasey*, 834 F.2d at 787-88, while another has upheld a search conducted one-and-one-half hours after the arrest, see *United States* v. *Fiala*, 929 F.2d 285, 288 (7th Cir. 1991).

In petitioner's and its *amici*'s view, *Belton* and its progeny have replaced the question of whether an area conceivably was within the arrestee's reaching distance with several other case-specific questions that are no easier to answer – such as, whether the arrestee was a "recent occupant" of the vehicle or whether the search was a "contemporaneous incident" of arrest. *Belton*, therefore, has failed to provide "a straightforward rule, easily applied, and predictably enforced," *Belton*, 453 U.S. at 458-60, and presents a poor forbearer for the type of expansion petitioner and its *amici* advocate. The reasonableness of a vehicle search incident to arrest still depends on the facts surrounding a given search. All *Belton* has done is shifted the inquiry away from *Chimel*'s fundamental principles to fact-specific questions not meaningfully connected to those principles. "So much for bright lines." *McLaughlin*, 170 F.3d at 895 (Trott, J., concurring).

C. Vehicle Searches Incident To Arrest Are Not *Per Se* Reasonable.

Petitioner and its *amici* also attempt to save their interpretation of *Belton* by arguing that vehicle searches such as the one at issue here are reasonable because the intrusion is minimal and the law enforcement needs are weighty. The premises underlying this argument are hopelessly flawed.

Petitioner and its *amici* first contend that the intrusion of a vehicle search incident to arrest is minimal because the arrestee's already-reduced expectation of privacy is further diminished (or even eliminated) by virtue of his custodial arrest. Although it is true that one has a lesser expectation of privacy in his automobile, "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge*, 403 U.S. at 461-62 (plurality opinion). Contrary to petitioner's and its *amici*'s argument, this Court expressly has recognized that an automobile search entails "a *substantial* invasion of privacy." *Ortiz*, 422 U.S. at 896 (emphasis added).

Nor is the intrusion appreciably lessened because the car's recent occupant was placed under custodial arrest. The *Chimel* Court rejected a similar argument that the warrantless search of the entire place of arrest should be permitted because, once an arrest has been made, the additional invasion of privacy stemming from the accompanying search is "relatively minor." *Chimel*, 395 U.S. at 766 n.12. The Court found no basis to conclude that, "simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." *Id.*

This Court employed similar reasoning in *Chadwick* to reject the argument that arrestees had a lesser expectation of privacy in a footlocker given their custodial arrests: "Unlike searches of the person, searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." *Chadwick*, 433 U.S. at 16 n.10. "Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest." *Id.*

So too here. A recent occupant does not surrender his privacy interest in his car and the containers within it simply because he was arrested, and his expectation of privacy in it is not lessened by virtue of his custodial arrest. "[T]he search of the passenger compartment of a motor vehicle and any containers therein, such as a purse, briefcase, or locked suitcase, is unrelated to, and differs in kind from, any interference with the arrestee's liberty." Rudstein, 40 Wake Forest L. Rev. at 1310 (footnotes omitted).

On the other side of the balance, petitioner and its *amici* argue that law enforcement needs are weighty. They first point to the security threat to officers when effecting custodial arrests. Without question, "a custodial arrest involves 'danger to an officer' because of 'the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.' *Knowles*, 525 U.S. at 117 (quoting *Robinson*, 414 U.S. at 234-35). This Court has recognized that "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." *Id.* (quoting *Robinson*, 414 U.S. at 234 n.5). But this Court has already crafted a rule to this end: It permits authorities to search an

arrestee's person and the area within his immediate control. Indeed, *Chimel* expressly concluded that the security threat to police was not sufficiently weighty to permit them to search beyond the area that is within the arrestee's immediate control. *Chimel*, 395 U.S. at 763.

Moreover, petitioner provides no reasoned explanation of how a search of a vehicle that is not conceivably accessible to the arrestee (as is the case most of the time) reduces the security threat to police ensuing from the recent occupant's custodial arrest.[21] Once the arrestee's access to the passenger compartment has been eliminated, so too has any threat of the arrestee obtaining a weapon (or anything) from it. In short, permitting authorities to search a vehicle incident to a recent occupant's arrest, in most instances, would not serve to mitigate any security threat to them.

Petitioner and its *amici* point to a second governmental interest in permitting authorities to search recent occupants' vehicles incident to arrest – the need to preserve evidence. *Chimel*, too, rejected the contention that this law-enforcement interest is sufficiently weighty to permit broad searches, like the one at issue here. *Chimel* expressly overruled a line of cases, including *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), and *Harris* v. *United States*, 331 U.S. 145 (1947), that authorized police to undertake searches incident to arrest of the entire place of arrest in order to uncover evidence of the charged crimes. The *Chimel* Court rejected authority to search on this rationale because it invited "extensive

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[21] *See infra* § III, for discussion of why this argument is purely speculative.

searches" that lacked any "point of rational limitation." *Chimel*, 395 U.S. at 766.

Moreover, there already exists a well-recognized exception to the warrant requirement permitting authorities to search vehicles for evidence, and it applies when authorities have *probable cause* to believe that evidence is within the vehicle. See *Ortiz*, 422 U.S. at 896. As explained above, even an arrestee has a legitimate expectation of privacy in his car and the containers therein, and petitioner's and its *amici*'s proposal to dispense with not only a warrant but also probable cause provides absolutely no protection for a recent occupant's legitimate and substantial privacy interests in his car and the containers within it. While suspicionless, exploratory searches often in fact do uncover evidence of crimes, the premise of the Fourth Amendment is that it is better to let evidence go undetected when there is no basis for a warrant and exigency rendering a warrantless search imperative than to intrude on an individual's privacy.

Ultimately, petitioner's and its *amici*'s "argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests." *Chimel*, 395 U.S. at 764-65. Under their "unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point." *Id.*

V. RESPONDENT WAS ARRESTED FOR NON-EVIDENTIARY OFFENSES.

In *Thornton*, two Members of this Court suggested refashioning *Belton* to rest on the government's interest in gathering evidence relevant to the crime of arrest. *Thornton*, 541 U.S. at 629 (Scalia J.

concurring in judgment). By reframing *Belton* in these terms, they would still permit warrantless vehicle searches incident to a recent occupant's arrest but only in "cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 632. Such an approach plainly excludes searches, such as the one at issue, that have no conceivable prospect, at inception, of uncovering "evidence relevant to the crime [of] arrest," such as when the arrest is for a "nonevidentiary" offense – an offense which, 'by its nature, does not give rise to cognizable grounds for concluding that evidence probative of its commission might be found in the vicinity of the arrestee.'" See James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. Ill. L. Rev. 1417, 1452 n.222.[22]

In this case, respondent was arrested for nonevidentiary offenses. As several courts have recognized, driving on a suspended license is a crime for which no probative evidence might be found in the arrestee's car and for which authorities have all the evidence necessary to prosecute at the time of arrest. See *United States* v. *Jackson*, 415 F.3d 88, 93 (D.C. Cir. 2005) (It was "entirely implausible" that there was "additional evidence to support the charges of driving on a suspended license, operating an unregistered vehicle, and driving without required vehicle identification tags" in car and officer already

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[22] One of respondent's *amici* expressly advocates this approach. *See* NACDL Br. Respondent supports either this approach or an approach expressly tied to exigencies. Under any rationale other than petitioner's interpretation of the *Belton* rule, respondent's suppression motion should have been granted.

had "all of the evidence that he needed to arrest the driver for the above offenses"); *State* v. *Parker*, 987 P.2d 73, 82-83 (Wash. 1999) (en banc) ("[W]here individuals are arrested for driving with license suspended, there is simply no evidence of the crime to be hidden or lost."); cf. *United States* v. *Robinson*, 414 U.S. 218, 223 n.2 (1973) (quoting police manual that police may not search a vehicle following an arrest for driving after revocation "because there is no probable cause to believe that the vehicle contains fruits, instrumentalities, contraband or evidence of the offense of driving after revocation"). Likewise, respondent's arrest on the outstanding warrant does not support the search under this proposed *Belton* revision. The state had all the evidence it required to prosecute that offense on the day respondent failed to appear, and no further evidence of that offense (or the underlying offense) conceivably existed within the car. In short, officers had no reason to believe that "evidence relevant to the crime of arrest might be found" in respondent's car and the vehicle search plainly did not serve the government's "general interest in gathering evidence *relevant to the crime [of] arrest[].*"[23] *Thornton*, 541 U.S. at 629, 632 (Scalia, J., concurring in judgment) (emphasis added).

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[23] That evidence of offenses unrelated to those of arrest may conceivably be found within an automobile cannot render the search reasonable. This type of exploratory search was rejected by this Court's pre-*Chimel* precedent, on which this approach rests. *See, e.g.*, *Harris*, 331 U.S. at 153.

CONCLUSION

The judgment of the Arizona Supreme Court should be affirmed.

Respectfully submitted,

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vs.

RODNEY JOSEPH GANT,

Respondent.

On Writ Of Certiorari
To The Arizona Supreme Court

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SUMMARY OF ARGUMENT

Gant misconstrues *Belton*'s bright-line rule by ignoring the fact that a search incident to arrest need only be a "contemporaneous incident" of the arrest. This Court's case law makes clear that although the search incident to arrest exception to the Fourth Amendment's probable cause and warrant requirements is premised upon the twin concerns of officer safety and preservation of evidence, neither exigency need exist in a particular case. The exigencies are subsumed in the search incident to arrest exception. Gant's strained construction of *Belton* to require that one of the exigencies exist at the precise moment that a law enforcement officer conducts a search incident to arrest is inconsistent with this Court's holdings, as well as with the holding of virtually every other court that has construed and applied *Belton*.

This Court should reject Gant's and his amici's suggestion that the Court should limit or overrule *Belton*. *Belton's* generalization is reasonable, sound, and far more workable and predictable than the totality of the circumstances analysis applied below by the Arizona Supreme Court. Moreover, *stare decisis* principles counsel against overruling *Belton*.

This Court should reject amicus National Association of Criminal Defense Lawyer's (NACDL) dangerous suggestion that *Belton* be limited to searches incident to arrest for nontraffic offenses only. Every full custody arrest presents a significant danger to the arresting officer. It is impossible to

predict how a person will react to being deprived of his freedom by being arrested, regardless of the basis for the arrest. This Court has repeatedly refused to accept the assertion that arrests for traffic offenses present less danger to arresting officers than arrests for more serious offenses.

Amicus National Association of Federal Defenders' (NAFD) statistical surveys comparing the number of assaults committed against law enforcement officers in states that follow *Belton's* bright-line rule to states that have rejected *Belton* on independent state-law grounds are unpersuasive and inconclusive. There are too many variables involved to give the statistics any credence. Rather, this Court should accept the avowals of the law enforcement amici that *Belton* has made officers safer in conducting their dangerous work on behalf of the citizens of this nation.

ARGUMENT

I. GANT MISCONSTRUES *BELTON'S* BRIGHT-LINE RULE BY IGNORING THE FACT THAT A SEARCH INCIDENT TO ARREST NEED ONLY BE A "CONTEMPORANEOUS INCIDENT" OF THE ARREST.

Gant asserts that the State of Arizona (Arizona) and its amici "propose a radical departure from this Court's Fourth Amendment jurisprudence." (Resp. Br. 1.) To the contrary, Arizona and its amici propose

maintaining a bright-line rule that this Court announced more than twenty-seven years ago in *New York v. Belton*, 453 U.S. 454 (1981). The *Belton* rule has provided consistent guidance to law enforcement and the public and has struck an appropriate balance between the exigencies arising from an arrest and competing privacy interests.

Gant maintains that the bright-line rule that this Court articulated in *Belton* and recently reaffirmed in *Thornton v. United States*, 541 U.S. 615 (2004), is not as bright as Arizona, its amici, and virtually every court that has applied *Belton* believe it to be. Rather, he contends that *Belton* merely holds that law enforcement officers may search the passenger compartment of a vehicle incident to the arrest of its recent occupant only if "any part of the car is arguably within the immediate control of its recent occupant" when the search is conducted. (Resp. Br. 15) (initial capitals altered to lower case).[1] This interpretation, however, incorrectly divorces the search from the arrest and dispenses with the requirement that the search need only be contemporaneous with the arrest.[2]

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[1] Gant effectively jettisons the Arizona Supreme Court majority's "totality of the circumstances" analysis. (*See* J.A. 165-66.) He asserts that *his* reading of *Belton* assures that "specific exigent circumstances exist." (Resp. Br. 10) (capitals altered to lower case).

[2] Gant repeatedly stresses the fact that the search of his car was "warrantless," asserting that Arizona's burden to justify the

(Continued on following page)

A. Pre-*Chimel* Cases Made Clear That A Search Incident To Arrest Need Only Be "Substantially Contemporaneous" With The Arrest.

Gant emphasizes that in *Chimel v. California*, this Court relied upon the twin rationales of officer safety and preservation of evidence in holding that a "search incident to arrest" may constitutionally be conducted only on "the arrestee's person and the area 'within his immediate control,'" 395 U.S. 752, 762-63 (1969). (Resp. Br. 11-12.) While this Court "construe[ed] that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence," *Chimel*, 395 U.S. at 763, it did not address the issue of the search's contemporaneity with the arrest. It was not necessary for the Court to

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search is somehow heightened by the lack of a warrant. (*See* Resp. Br. 10-15 & n.4.) However, a warrant is *never* required to search an automobile. *See, e.g., Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (per curiam) (police need not obtain a warrant to search an automobile because "under our established precedent, the 'automobile exception' has no separate exigency requirement"); *California v. Carney*, 471 U.S. 386, 391 (1985) ("Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception [to the warrant requirement]."). Under the "automobile exception" to the warrant requirement, only probable cause is required to search an automobile. *See, e.g., Dyson*, 527 U.S. at 466-67; *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam). Thus, to the extent that Gant relies upon law grounded on the Fourth Amendment warrant requirement, his reliance is misplaced.

do so in that case because the scope of the search far exceeded the area of Chimel's "immediate control." *Id.* at 768. The arresting officers "looked through the entire three-bedroom house, including the attic, the garage, and a small workshop." *Id.* at 754.

Although the Court did not address the contemporaneity issue in *Chimel*, it had previously made clear that a search incident to arrest need only be "substantially contemporaneous with the arrest and . . . confined to the immediate vicinity of the arrest." *Stoner v. California*, 376 U.S. 483, 486 (1964) (search of hotel room in California two days before arrest in Nevada not "incident to . . . arrest"); *see also Preston v. United States*, 376 U.S. 364, 367-68 (1964) (search of car after arrestees were transported to the police station and car was towed to a garage "was too remote in time or place to have been made as incidental to the arrest"). Indeed, the same day that this Court decided *Chimel*, it reaffirmed the "substantially contemporaneous" standard for searches incident to arrest. *See Shipley v. California*, 395 U.S. 818, 819-20 (1969) (per curiam) (quoting *Stoner*, 376 U.S. at 486). And only a year before this Court decided *Belton*, it held that a search incident to arrest could actually precede the arrest. *See Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.").

B. The Exigencies Of Officer Safety And Preservation Of Evidence Underlying The Search Incident To Arrest Exception Need Not Exist In Any Given Case.

In *United States v. Robinson*, a police officer arrested Robinson for driving on a revoked license and searched his clothing incident to the arrest, finding heroin in his coat pocket. 414 U.S. 218, 220-23 (1973). The lower court held that the search of Robinson's clothing incident to his arrest was not justified because no "evidence or fruits" of the offense of driving on a revoked license could be found on Robinson and the officer had no reason to believe that he was armed. *Id.* at 233-34. This Court reversed, stating that it had a "fundamental disagreement" with the lower court's "suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Id.* at 235. This Court made clear that "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.* In other words, the exigencies discussed in *Chimel* are subsumed in the search incident to arrest exception to the Fourth Amendment's probable cause and warrant requirements. *See id.* "It is the fact of the

lawful arrest which establishes the authority to search. . . ." *Id.*[3]

C. Neither *Chadwick* Nor *Sanders* Is Relevant.

In an attempt to drive a wedge between an arrest and a contemporaneous search incident to that arrest, Gant relies upon snippets of dicta from *United States v. Chadwick*, 433 U.S. 1 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991), and *Arkansas v. Sanders*, 442 U.S. 753 (1979), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991). (Resp. Br. 13-15.) In *Chadwick*, the Court wrote that "the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency." 433 U.S. at 15. In fact, the search occurred after police took Chadwick, his associates, and the footlocker to a federal building. *Id.* at 4. Thus, *Chadwick* is simply inapposite.

In *Sanders*, police stopped a taxi in which Sanders and an associate were passengers. 442 U.S. at

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[3] Gant relegates *Robinson* to a footnote, claiming that it "was limited to searches of the arrestee's person." (Resp. Br. 13 n.5.) While it is true that *Robinson* involved the search of a person incident to arrest, *Belton* clearly applied the principles in that case to automobile searches incident to arrest. 453 U.S. at 458-61. *Robinson* cannot be so easily dismissed.

755. At the request of the police, the taxi driver opened the trunk of the vehicle where police found and opened a green suitcase that contained marijuana. *Id.* This Court held that the search violated the Fourth Amendment because the police had failed to obtain a warrant to search the suitcase. *Id.* at 763-64. In a footnote, the Court stated that it had *not* considered "the constitutionality of searches of luggage incident to the arrest of its possessor." *Id.* at 763 n.11. The Court then remarked, "The State has not argued that respondent's suitcase was searched incident to his arrest, and it appears that the bag was not within his 'immediate control' at the time of the search." *Id.* The trunk of an automobile does *not* fall within *Belton's* bright-line rule. *Belton*, 453 U.S. at 460 n.4. Like *Chadwick, Sanders* is inapposite.

Finally, both *Chadwick* and *Sanders* predated this Court's pronouncement of its bright-line rule in *Belton*. And in *Belton*, this Court specifically rejected the New York Court of Appeals' reliance upon *Chadwick* and *Sanders*, pointing out that "neither of those cases involved an arguably valid search incident to a lawful custodial arrest." 453 U.S. at 461-62.

D. *Belton* Clearly Holds That A Search Need Only Be A "Contemporaneous Incident" Of An Arrest.

Having misconstrued the framework that underlies a search incident to a lawful arrest by artificially divorcing the search from the arrest itself, Gant

asserts that "*Belton* merely created the legal fiction that if some part of the passenger compartment is within a recent occupant's reach, then all of it is within his reach, including any containers therein." (Resp. Br. 17.) He maintains that in *Belton*, this Court required that two "conditions" (or "triggers") be met before a law enforcement officer may conduct a search of the passenger compartment of a vehicle incident to a lawful arrest: (1) "the car [was] arguably within the arrestee's immediate control" at the precise moment of the search; and (2) the arrestee was a "recent occupant" of the vehicle. (*Id.* 18-19.) Gant asserts that the first condition was met in *Belton* because "the arrestees stood unrestrained, next to the car during the search and thus the car was conceivably accessible to them when the officer searched it." (*Id.* 17.) That assertion is at odds with how this Court and the New York Court of Appeals viewed the vehicle's accessibility at the time that the officer made the arrests, then searched the vehicle.

In its decision finding that the search violated the Fourth Amendment, the New York Court of Appeals wrote that "[t]he car was in a secure place where it could have been easily guarded, its occupants under arrest and *safely away from the vehicle*, their removal to the police station imminent." *People v. Belton*, 407 N.E.2d 420, 423 (N.Y. 1980), *rev'd by New York v. Belton*, 453 U.S. 454 (1981) (emphasis added). This Court wrote that after arresting Belton and the other recent occupants of the vehicle, the officer "patted down each of the men and 'split them

up into four separate areas of the Thruway at this time so they would not be in physical touching area of each other,'" then searched the vehicle's passenger compartment. *Belton*, 453 U.S. at 456. In his dissent, Justice Brennan pointed out that neither Belton nor any of the other recent occupants could "possibly reach" the vehicle at the time of the arrest and subsequent search. 453 U.S. at 466 (Brennan, J., dissenting). In fact, Justice Brennan wrote that "[u]nder the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest . . . ." *Id.* at 468 (Brennan, J., dissenting).

Furthermore, this Court clearly stated its holding: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, *as a contemporaneous incident of that arrest*, search the passenger compartment of that automobile." *Id.* at 460 (emphasis added). This Court subsequently stated in *Michigan v. Long* that "the 'bright line' that we drew in *Belton* clearly authorizes [the search of a passenger compartment of an automobile] *whenever* officers effect a custodial arrest." 463 U.S. 1032, 1049 n.14 (1983) (emphasis added). In *Florida v. Thomas*, this Court wrote that in *Belton*, "we established a 'bright-line' rule permitting a law enforcement officer who has made a lawful custodial arrest of the occupant of a car to search the passenger compartment of that car *as a contemporaneous incident of the arrest*." 532 U.S. 774, 776 (2001)

(emphasis added). In *Thornton*, this Court reaffirmed its bright-line rule and made clear that the search need only be a contemporaneous incident of the arrest:

> The need for a clear rule, readily understood by police officers and *not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment*, justifies the sort of generalization which *Belton* enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.

541 U.S. at 622-23 (emphasis added).

Finally, courts across the country have fully understood *Belton*'s bright-line rule to require only that the search of a vehicle's passenger compartment incident to arrest be substantially contemporaneous with the arrest of the vehicle's recent occupant and have been virtually unanimous in upholding such searches where the arrestee is handcuffed and placed in a patrol car prior to the search of the vehicle. (*See* Pet. Cert. 15-17; U.S. Br. 19-20 & n.1; States' Br. 8-14 & n.3.) The fact that a search need only be "substantially contemporaneous" with the arrest, *Stoner*, 376 U.S. at 486, or "a contemporaneous incident of that arrest," *Belton*, 453 U.S. at 460, cannot simply be read out of this Court's case law governing searches incident to arrest.

II. THIS COURT SHOULD DECLINE GANT'S INVITATION TO OVERRULE *BELTON*.

The crux of Gant's and his amici's argument is that *Belton* should be limited or overruled. (Resp. Br. 32.) Gant alleges three "special justifications" for overruling *Belton*: (1) *Belton's* generalization is empirically false; (2) *Belton's* bright-line rule does not eliminate line-drawing inquiries; and (3) vehicle searches incident to arrest are not per se reasonable. (Resp. Br. 32, 35, 38, 42.)

A. *Belton's* Generalization That The Passenger Compartment Of An Automobile Is Within The Immediate Control Of A Recent Occupant Is Reasonable.

1. Bright-Line Rules Are Desirable In Regulating Police Conduct, Particularly When Officer Safety Is At Risk.

Gant asserts that *Belton's* "bright-line rule is an anomaly in this Court's Fourth Amendment jurisprudence." (Resp. Br. 36.) Not so. This Court has traditionally rejected the adoption of bright-line rules concerning Fourth Amendment issues that necessarily turn upon the specific facts of a given case, such as the voluntariness of a person's consent to search, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996), and whether a seizure has occurred, *United States v. Drayton*, 536 U.S. 194, 201 (2002). Those issues by their very nature are not amenable to per se rules. However, this Court has adopted bright-line rules

governing police conduct, particularly where officer safety is at risk. *See, e.g., Wyoming v. Houghton*, 526 U.S. 295, 304-07 (1999) (adopting bright-line rule permitting search of a passenger's belongings found in car even though probable cause to search relates only to the driver); *Maryland v. Wilson*, 519 U.S. 408, 413-15 (1997) (adopting bright-line rule allowing police to order all passengers out of a stopped vehicle, regardless of whether they pose a risk of danger); *Michigan v. Summers*, 452 U.S. 692, 702-05 (1981) (adopting bright-line rule permitting police to detain the occupants of a premises while search warrant is being executed); *Robinson*, 414 U.S. at 235 (adopting bright-line rule authorizing a search incident to arrest, regardless whether there is any reason to believe that person is armed or possesses evidence). (*See also* U.S. Br. 24-26.)

In *Belton*, which relied in large part on *Robinson* in adopting its bright-line rule, this Court wrote that "[i]n short, '[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" 453 U.S. at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). And just recently, in *Virginia v. Moore*, this Court wrote that "[i]n determining what is reasonable under the Fourth Amendment, we have given great weight to the 'essential interest in readily administrable rules.'" 128 S. Ct. 1598, 1606 (2008) (quoting

Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001)).

While it is true that bright-line rules are not suitable in many Fourth Amendment contexts, they are desirable – indeed, essential – in determining the scope of the search of a vehicle incident to the arrest of its recent occupant. *See Washington v. Chrisman*, 455 U.S. 1, 7 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer."); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (arresting automobile occupants presents "inordinate risk" to law enforcement officers); *Robinson*, 414 U.S. at 234 n.5 ("The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty . . . ."). In addition to the paramount concern for officer safety, "[t]his Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances." *Oliver v. United States*, 466 U.S. 170, 181 (1984). This Court has "traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater*, 532 U.S. at 347.

2. *Belton's* Generalization Is Sound.

Gant asserts that the generalization upon which this Court based *Belton's* bright-line rule is empirically false. (Resp. Br. 35.) His assertion is premised on his refusal to accept that a search incident to arrest need only be "a contemporaneous incident of that arrest," *Belton*, 453 U.S. at 460. (*See* Resp. Br. 37-38.) However, as previously discussed, a search incident to arrest cannot be divorced from the arrest itself. The search is part and parcel of the arrest. This Court made clear in *Belton* that its "generalization" is that the passenger compartment of an automobile is "in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m][,]'" so that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, *as a contemporaneous incident of that arrest*, search the passenger compartment of that automobile." 453 U.S. at 460 (quoting *Chimel*, 395 U.S. at 763) (emphasis added).

Moreover, whether an arrestee is "secured" is simply a matter of degree. Is the arrestee sufficiently secured if he is handcuffed but in close proximity to the automobile when the search incident to arrest is conducted? Is the arrestee sufficiently secured if he is handcuffed and positioned twenty feet from the automobile when the search incident to arrest is conducted? Is the arrestee sufficiently secured if he is handcuffed and placed in a patrol car when the search incident to arrest is conducted? What if there

are other recent occupants that police have no justification to secure? *Belton* sought to avoid these "'sorts of ifs, ands, and buts requiring the drawing of subtle nuances and hairline distinctions'" by adopting "a straightforward rule, easily applied and predictably enforced." 453 U.S. at 458, 459 (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. Ct. Rev. 127, 141).

Even when an arrestee is handcuffed and secured in the back seat of a police car, danger still exists. In 2007 alone there were at least ninety-three reported instances of handcuffed arrestees escaping after being secured in the back seat of a police car. *See* Okl. Highway Patrol, *Trooper Trap: 2007 – Publicized Escapes*, http://www.oktrooper.com/examples-2007.html (2008).[4] While securing an arrestee in a police car certainly reduces the risk that the arrestee could access his vehicle to obtain a weapon or destroy evidence, it does not eliminate the risk. A *Belton* search *does* eliminate the risk.

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[4] "Trooper Trap," a manufacturer of prisoner seatbelt alarms, compiled the escape summaries and accompanying news links on the Oklahoma Highway Patrol web site. Trooper Trap is neither endorsed by, nor affiliated with, the Oklahoma Highway Patrol. The number of escapes (ninety-three) reflects only those instances where it can be determined through the incident summary that the arrestee was *handcuffed* and secured in the *back* seat of a police car. The actual number of such escapes is likely greater.

At bottom, the generalization upon which this Court based *Belton* remains sound. "A custodial arrest is fluid and '[t]he danger to the police officer flows from *the fact of the arrest*, and its attendant proximity, stress, and uncertainty . . . .'" *Thornton*, 541 U.S. at 621 (quoting *Robinson*, 414 U.S. at 234-35 & n.5); *see also Chrisman*, 455 U.S. at 7 ("Every arrest must be presumed to present a risk of death to the arresting officer."); *Mimms*, 434 U.S. at 110 ("We think it too plain for argument that the State's proffered justification – the safety of the officer – is both legitimate and weighty.").

3. *Chimel* Is Based Upon A Similar Generalization.

Gant asserts that "[t]he commonplace practice of securing the arrestee in a police cruiser plainly puts the passenger compartment beyond the arrestee's 'immediate control.'" (Resp. Br. 37.) Justice Scalia expressed the same view in his concurring opinion in *Thornton*. *See* 541 U.S. at 627-28 (Scalia, J., concurring in the judgment). However, as discussed in the Opening Brief, *Chimel* is based upon a similar generalization. (Pet. Br. 41-43.) Gant and his amici fail to address that conundrum.

Just as this Court had no occasion in *Chimel* to discuss the issue of contemporaneity, it likewise had no occasion to discuss the issue of restraint of the arrestee during the course of a search incident to arrest. *See* 395 U.S. at 762-68. Nevertheless, it is

difficult to imagine that this Court believed that police officers would leave an arrestee unsecured while searching the area under the arrestee's "immediate control." It stands to reason that a police officer would necessarily secure an arrestee *before* searching the area under his immediate control. *See Thornton*, 541 U.S. at 627 (Scalia, J., concurring in the judgment) ("If 'sensible police procedures' require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search."); *see also* Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 Wis. L. Rev. 657, 665 (citing police training materials that included the following statements: "[t]horoughly search the suspect after applying the handcuffs" and "[a] search should not be initiated in arrest situations until the individual is handcuffed and incapacitated as much as possible."). Lower courts have treated *Chimel* as a bright-line rule, upholding searches incident to a lawful arrest even after the arrestee has been secured and could not feasibly access the "immediate control" area.[5]

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[5] *See, e.g., United States v. Abdul-Saboor*, 85 F.3d 664, 670-71 (D.C. Cir. 1996) (room in which arrestee was handcuffed and seated in chair prior to search was within his "immediate control"); *United States v. Queen*, 847 F.2d 346, 349, 352-54 (7th Cir. 1988) (arrestee guarded by two armed officers, hands cuffed behind his back, prior to search of closet three feet away); *Davis v. Robbs*, 794 F.2d 1129, 1130-31 (6th Cir. 1986) (arrestee handcuffed and placed in squad car prior to seizure of rifle in

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Should this Court determine that *Belton* was wrongly decided because the generalization underlying its bright-line rule is not sound, that determination necessarily would undermine *Chimel's* rationale as well. *See Moskovitz*, 2002 Wis. L. Rev. at 677 ("The problem [with *Belton's* generalization] can be traced back to the flaw in *Chimel* itself."). If *Chimel* is undermined, this Court would have to reexamine the proper scope of searches incident to arrest in all contexts, an issue with which this Court had struggled for fifty years before *Chimel*. 395 U.S. at 755-62.

B. The *Belton* Rule Is More Workable And Predictable Than A Case-By-Case Totality Of The Circumstances Analysis.

Gant asserts that the *Belton* rule "does not eliminate line drawing," and he cites lower court cases that have reached inconsistent conclusions concerning determinations of "recent occupant," *Thornton*, 541 U.S. at 622, and whether a search is a

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house); *United States v. Silva*, 745 F.2d 840, 847 (4th Cir. 1984) (arrestees handcuffed and guarded by agents prior to search of room); *United States v. Palumbo*, 735 F.2d 1095, 1096-97 (8th Cir. 1984) (arrestee surrounded by several officers and handcuffed prior to search of room); *United States v. Roper*, 681 F.2d 1354, 1357-59 (11th Cir. 1982) (arrestee handcuffed in hallway of motel and escorted inside room by agents prior to search of briefcase); *see also Moskovitz*, 2002 Wis. L. Rev. at 690 ("Arguably, like it or not, to be faithful to *Chimel*, lower courts must adopt the 'time of arrest' approach.").

"contemporaneous incident of th[e] arrest," *Belton*, 453 U.S. at 460. (Resp. Br. 39-41 & n.20.) While no bright-line rule can totally eliminate inconsistencies in application, the *Belton* rule is far more workable and predictable than a "totality of the circumstances" analysis conducted on a case-by-case basis. (J.A. 165-66.) *See also Oliver*, 466 U.S. at 181 ("This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances."). Determining whether someone is a "recent occupant" of a vehicle and whether the search is "contemporaneous" with the arrest involves an assessment of terms that are commonly understood by law enforcement officers and the general public. Any possible confusion regarding those terms pales in comparison to the difficulty that would ensue in making a case-by-case totality of the circumstances analysis of the exigencies of a particular arrest. To the extent this Court believes that lower courts require further guidance, it can provide such guidance without abandoning *Belton*, thereby leaving police officers and citizens lost at sea in determining the scope of Fourth Amendment protection. *See Belton*, 453 U.S. at 459-60 ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.").

C. The Search Of An Automobile As A Contemporaneous Incident Of The Arrest Of A Recent Occupant Is Reasonable.

Gant asserts that the search of an automobile as a contemporaneous incident of the arrest of a recent occupant is "not *per se* reasonable." (Resp. Br. 42) (initial capitals altered to lower case). That is simply not true. This Court has held that a search incident to arrest "is not only an exception to the warrant requirement of the Fourth Amendment, but it is also a 'reasonable' search under that Amendment." *Robinson*, 414 U.S. at 235. "It is the fact of the lawful arrest which establishes the authority to search . . . ." *Id.*; *see also Belton*, 453 U.S. at 461 ("'A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.'") (quoting *Robinson*, 414 U.S. at 235). Therefore, a search of the passenger compartment of an automobile as a contemporaneous incident of the lawful arrest of its recent occupant is "*per se* reasonable." *See Thornton*, 541 U.S. at 620 ("'[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.'") (quoting *Belton*, 453 U.S. at 460). In adopting a bright-line rule permitting the search of the passenger compartment of an automobile incident to the arrest of a recent occupant, this Court properly

balanced an arrestee's significantly reduced expectation of privacy in the automobile against the paramount interest of officer safety and the interest in preserving evidence. (*See* Pet. Br. 23-27; U.S. Br. 27-28.)

Gant attacks this Court's conclusion by asserting that "this Court expressly has recognized that an automobile search entails 'a *substantial* invasion of privacy.'" (Resp. Br. 42 [quoting *United States v. Ortiz*, 422 U.S. 891, 896 (1975)]) (emphasis supplied by Gant). However, in *Ortiz,* this Court wrote that "[a] search, *even of an automobile*, is a substantial invasion of privacy." 422 U.S. at 896 (emphasis added). The Court then noted that "[t]he degree of the invasion of privacy in an automobile search may vary with the circumstances, as there are significant differences between 'an automobile and a home or office.'" *Id.* n.2 (quoting *Chambers v. Maroney*, 399 U.S. 42, 48 (1970)). Thus, in *Ortiz*, this Court noted that one's expectation of privacy in an automobile is "significant[ly]" less than it is in a home or office. *Id.* Furthermore, Gant's reliance upon *Chadwick* (Resp. Br. 43) is misplaced because in *Chadwick*, "the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency." 433 U.S. at 15. Moreover, this Court held that a *search warrant* was required to search the footlocker. *Id.* at 15-16.

As Arizona and the United States have discussed, a person retains a "limited" expectation of privacy in the automobile in which he was a recent occupant. (Pet. Br. 23-24; U.S. Br. 27-30.) And that limited expectation of privacy is "diminished further when the occupants are placed under custodial arrest." *Robbins v. California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring in the judgment), *overruled on other grounds by United States v. Ross*, 456 U.S. 798 (1982). That minimal expectation of privacy pales in comparison to the paramount interest in officer safety, coupled with the interest in preserving evidence. *See id.* This Court struck the proper balance in *Belton* by pronouncing the bright-line rule that police may search the passenger compartment of an automobile as a contemporaneous incident of the arrest of an occupant or recent occupant. Gant provides no valid rationale for this Court to revisit that determination.

D. *Stare Decisis* Principles Warrant Affirmance Of *Belton* And *Thornton*.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Therefore, overruling precedent requires "'special justification.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). And a party who asks this Court "to reconsider not one but two prior decisions

bears a heavy burden of supporting such a change in [the Court's] jurisprudence." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980).

Arizona and its fellow states have thoroughly discussed the prudential and pragmatic reasons that this Court should refuse to overrule *Belton* and *Thornton*. (Pet. Br. 37-43; States' Br. 6-24.) In a nutshell, *Belton's* bright-line rule (1) is workable and predictable; (2) promotes the safety of law enforcement officers and the public at large; (3) has been relied upon by law enforcement in training and in the field to the point that it has become routine police practice; (4) has been enshrined as part of state law[6] in the overwhelming majority of states; and (5) has not been called into question by changed circumstances warranting its reconsideration. An arrestee's minimal expectation of privacy in the passenger compartment of an automobile in which he was a recent occupant pales in comparison to these compelling reasons to preserve *Belton's* bright-line rule.

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[6] Of particular significance is the fact that several states have seen fit to adopt *Belton's* bright-line rule in interpreting their own state constitutional search and seizure provisions. (States' Br. 14.)

III. THIS COURT SHOULD REJECT NACDL'S SUGGESTION TO LIMIT *BELTON* SEARCHES INCIDENT TO ARREST TO NONTRAFFIC OFFENSES.

Gant's amicus, National Association of Criminal Defense Lawyers (NACDL), suggests that this Court limit *Belton* searches to nontraffic arrests. This Court should reject this suggestion out of hand.

"Every arrest must be presumed to present a risk of danger to the arresting officer." *Chrisman*, 455 U.S. at 7. This Court has "recognized that '[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and *not from the grounds for arrest.*'" *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (quoting *Robinson*, 414 U.S. at 234 n.5) (emphasis added). "[P]otential dangers lurk[] in *all* custodial arrests . . . ." *Chadwick*, 433 U.S. at 14-15 (emphasis added). This Court has "expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations." *Mimms*, 434 U.S. at 110 (citing *Robinson*, 414 U.S. at 234).

NACDL's reliance upon *Knowles* is misplaced. (*See* NACDL Br. 24.) Knowles was stopped and cited (*not* arrested) for speeding, and the arresting officer "conducted a full search of the car[,]" finding contraband. 525 U.S. at 114. This Court refused to expand *Robinson's* (and *Belton's*) "'bright-line rule,' which was based on the concern for officer safety and

destruction or loss of evidence, but which did not depend in every case upon the existence of either concern," to a "search incident to citation." *Id.* at 118-19. This Court wrote that "the concern for officer safety" still existed "in the case of a routine traffic stop" even when an arrest was not made, and that officers could order the driver and passengers out of the vehicle, conduct a "'*Terry* patdown'" of the driver, the passengers, and the passenger compartment of the vehicle if necessary, "and even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest." *Id.* at 117-18 (citing *Belton*, 453 U.S. at 460). This Court went on to point out that Iowa had not "shown the second justification for the authority to search incident to arrest – the need to discover and preserve evidence." *Id.* at 118. This Court noted that evidence of "excessive speed" could not be found on Knowles' person "or in the passenger compartment of the car." *Id.*

In *most* arrests for traffic-related offenses, the preservation of evidence justification for a search incident to arrest will not exist.[7] However, the paramount

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[7] That is *not* true in this case. Under Arizona law, a person is guilty of driving on a suspended license only if "the driver knew or should have known that the license has been suspended." *State v. Williams*, 698 P.2d 732, 734 (Ariz. 1985); *see also State v. Cifelli*, 155 P.3d 363, 366-69 (Ariz. App. 2007). Officer Griffith testified that "[l]icense paperwork from the court system" could possibly be found in the vehicle. (J.A. 73-74.) Officer Reed testified that it would not be unusual to find

(Continued on following page)

concern for officer safety exists in "[e]very arrest." *Chrisman*, 455 U.S. at 7. Indeed, in *Knowles* this Court made clear that the danger to law enforcement officers flowed "'from the fact of the arrest . . . and not from the grounds for arrest.'" 525 U.S. at 117 (quoting *Robinson*, 414 U.S. at 234 n.5). A person being subjected to a full custody arrest for a traffic-related offense (i.e., driving under the influence, reckless driving, driving on a suspended or revoked license) is just as likely to react unpredictably to being deprived of his freedom as would a career burglar or thief who might view an arrest as simply a cost of doing business. "There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger." *Chrisman*, 455 U.S. at 7.

This Court has recently reiterated that "[t]he interests justifying search are present *whenever* an officer makes an arrest." *Moore*, 128 S. Ct. at 1607 (emphasis added). In *Moore*, police officers arrested Moore for driving on a suspended license, searched him incident to arrest, and found cocaine and cash. *Id.* at 1601-02. Under state law, the arrest was illegal and Moore should have only been issued a summons.

"notification from Motor Vehicle Division that [Gant's] license had been suspended" or "a citation for a suspended license that would show that he had knowledge that his driver's license was suspended" in the vehicle. (J.A. 111.) Thus, Gant's assertion that the "officers had no reason to believe that 'evidence relevant to the crime of arrest might be found' in [his] car" (Resp. Br. 47) is inaccurate.

Id. at 1602. In rejecting Moore's assertion that the search incident to arrest violated the Fourth Amendment, this Court wrote that "[t]he state officers *arrested* Moore, and therefore faced the risks that are 'an adequate basis for treating all custodial arrests alike for purposes of search justification.'" *Id.* at 1608 (quoting *Robinson*, 414 U.S. at 235).

This Court should reject NACDL's dangerous suggestion that *Belton* searches be limited to arrests for nontraffic offenses.

IV. NAFD'S STATISTICAL SURVEYS ARE UNPERSUASIVE.

Gant's amicus, National Association of Federal Defenders (NAFD), presents this Court with statistical surveys from states that have rejected *Belton's* bright-line rule on independent state-law grounds. It concedes that the statistics are "not definitive." (NAFD Br. 7.) Nevertheless, it maintains that the statistics do not demonstrate that police officers face a higher risk of assault in states that have rejected *Belton's* bright-line rule. (*Id.*) Even then, it acknowledges that "the data do not distinguish between the effects of the prohibition against automatic vehicle searches and the effects of a multitude of other factors on the number of assaults against police officers." (*Id.* at 11.)

There are simply too many variables involved to give any credence to NAFD's statistical surveys.

Rather, this Court should accept the avowal of the law enforcement amici – Americans for Effective Law Enforcement, the International Association of Chiefs of Police, the International Sheriff's Association, The Arizona Law Enforcement Legal Advisors' Association, and the Arizona Association of Chiefs of Police – that *Belton's* bright-line rule "has made officers more *effective* and *safe* by allowing a fleeting window of authority that minimally impacts the privacy interests of arrested persons." (AELE et al. Br. 11.)

CONCLUSION

This Court should reverse the judgment of the Arizona Supreme Court and hold that the search of the passenger compartment of Gant's vehicle was a valid search incident to his arrest.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-542

In the Supreme Court of the United States

STATE OF ARIZONA, PETITIONER

v.

RODNEY JOSEPH GANT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

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In the Supreme Court of the United States

No. 07-542

STATE OF ARIZONA, PETITIONER

v.

RODNEY JOSEPH GANT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether law enforcement officers must demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless search of a car incident to arrest, after the car's recent occupants have been arrested and secured. The resolution of that question will affect the practices of federal law enforcement officers in the commonly recurring situation in which the recent occupant of a vehicle is arrested. In addition, it will affect the admissibility in federal prosecutions of evidence obtained by federal, state, or local law enforcement agents as the result of the search of an automobile incident to the lawful arrest of an individual who has recently occupied the vehicle. The United States therefore has a substantial interest in this case, and indeed

has participated in previous cases presenting this issue. See, *e.g.*, *Thornton* v. *United States*, 541 U.S. 615 (2004); *New York* v. *Belton*, 453 U.S. 454 (1981).

STATEMENT

1. On August 25, 1999, two Tucson, Arizona, police officers responded to a report of possible drug activity at a residence. Respondent answered the door, identified himself, and told the officers that the homeowner would return later that day. The officers left. They subsequently ran a records check on respondent and discovered that his driver's license was suspended and that he had an outstanding arrest warrant for driving on a suspended license. J.A. 151-152.

The officers returned to the house that night. They encountered a man outside the house and, soon thereafter, made contact with a woman sitting in a parked car. After speaking with those individuals, the officers arrested the woman for possession of a crack pipe and the man for providing a false name to the officers. Both were handcuffed and placed in locked patrol cars. J.A. 145, 152; Pet. App. B5; see J.A. 48-50, 60, 81, 108.

As officers placed the two individuals into patrol cars, respondent returned to the scene driving a car. Respondent entered the driveway for the residence, passing within a few feet of an officer, who shined his flashlight into the passenger compartment and recognized respondent from earlier in the day. That officer immediately summoned respondent as he got out of his car and, after respondent walked approximately 8-12 feet to meet the officer, placed respondent under arrest for the outstanding warrant and for driving with a suspended license. The officer handcuffed respondent and placed him in a locked patrol car, where respondent remained

under the supervision of that officer. By that time, a total of four or five officers were at the scene. While officers had been told that the homeowner might return, the homeowner had yet to appear. J.A. 145-146, 148-149, 152; Pet. App. B5, B9 n.4; see J.A. 51-58, 61, 71-72, 77-79, 100, 114, 119.

Two officers immediately searched the passenger compartment of respondent's car and discovered a handgun and a baggie containing cocaine. After the search was completed, respondent's vehicle was towed to a police station and impounded. Respondent was charged with one count of possessing narcotics for sale and one count of possessing drug paraphernalia. J.A. 152; see J.A. 61-63, 70, 98, 129.

2. Respondent moved to suppress the evidence found in his vehicle, but the Arizona Superior Court denied his pretrial motion. J.A. 37-39, 43. A jury subsequently found respondent guilty on both counts and, in October 2000, the court imposed a three-year sentence of imprisonment. Pet. App. B4; J.A. 2. The Arizona Court of Appeals reversed respondent's convictions, holding that his suppression motion should have been granted because the police did not make contact with respondent until after he had exited his vehicle. *State* v. *Gant*, 43 P.3d 188, 194 (Ariz. App. 2002). The Arizona Supreme Court denied review, J.A. 153, and this Court granted the State's petition for a writ of certiorari. *Arizona* v. *Gant*, 538 U.S. 976 (2003).

The Arizona Supreme Court subsequently decided *State* v. *Dean*, 76 P.3d 429 (Ariz. 2003), which abrogated the rule adopted by the court of appeals in this case, concluding that the police may search a car incident to arrest even if they initiate contact with the arrestee after he has exited the vehicle. See *id.* at 434-437 (discuss-

ing *Gant*, 43 P.3d 188). This Court accordingly vacated the judgment of the Arizona Court of Appeals in this case and remanded for reconsideration in light of *Dean. Arizona* v. *Gant*, 540 U.S. 963 (2003).

Because the trial court had addressed the search of respondent's car based on stipulated facts rather than testimony, the court of appeals remanded for an evidentiary hearing. Pet. App. B4-B5. After conducting hearings, J.A. 44-142, the trial court again upheld the search. J.A. 143-149. The court concluded that the search was incident to respondent's arrest because the police arrested him seconds after he got out of the car and searched his car immediately after that arrest. J.A. 148-149.

Respondent again appealed to the Arizona Court of Appeals, which reversed in a divided opinion. Pet. App. B1-B23. The majority held that the search of respondent's vehicle violated the Fourth Amendment because it was not contemporaneous with respondent's arrest and did not satisfy the rationale for a search incident to arrest under *Chimel* v. *California*, 395 U.S. 752 (1969). Pet. App. B14-B15; see J.A. 153.

3. The Arizona Supreme Court granted the State's petition for review and, in a 3-2 decision, affirmed the judgment of the court of appeals while vacating its opinion. J.A. 154, 166-167. The majority held that the search of respondent's car violated the Fourth Amendment because it was not justified by the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. J.A. 166. The court explained that this Court in *Chimel* justified that exception based on the twin "rationales of officer safety and preservation of evidence," and that *Chimel* therefore limited the scope of a search incident to arrest to the suspect's person and

"the area 'within his immediate control,'" that is, the "area from within which he might gain possession of a weapon or destructible evidence." J.A. 155 (quoting *Chimel*, 395 U.S. at 763).

In the court's view, this Court's subsequent decision in *New York* v. *Belton*, 453 U.S. 454 (1981), merely defined the "permissible scope" of an "otherwise lawful search of an automobile incident to arrest." J.A. 156. On that view, *Belton* established only a bright-line rule that the area within the arrestee's immediate control will include the vehicle's passenger compartment and the containers within that compartment. *Ibid.* The majority concluded that *Belton* did not address "the threshold question whether the police may conduct a search incident to arrest at all." J.A. 156-157. The court answered that question by holding that, under *Chimel*, such a search must be supported on a case-by-case basis by "determin[ing] whether officer safety or the preservation of evidence" actually justified the search. *Ibid.* The court concluded that a search cannot be justified if the "totality of the circumstances" indicates that "an arrestee is secured and thus presents no reasonable risk to officer safety or the preservation of evidence." J.A. 165-166.

Applying that test, the court held that the search of respondent's car was unjustified because it was not "necessary to protect the officers at the scene or prevent the destruction of evidence." J.A. 160. It emphasized that, when the search began, respondent and the other two arrestees at the scene were handcuffed and placed in the back of locked patrol cars; at least four officers were present, including one officer supervising respondent; and no unsecured civilians had been identified in the vicinity. J.A. 157. Under those circumstances, the

court concluded that "the police had no reason to believe" that their safety was at risk or that anyone could gain access to respondent's vehicle. *Ibid.* The court accordingly held that the search was not a lawful search incident to arrest because neither *Chimel* rationale specifically applied to this case. *Ibid.*

The court acknowledged that it was "possible" to interpret *Belton*'s bright-line rule as dispensing with the need for the police to "assess the exigencies" surrounding each custodial arrest. J.A. 158. It likewise recognized that, in *Thornton* v. *United States*, 541 U.S. 615 (2004), this Court upheld a search on facts that "resemble" the facts in this case, J.A. 160-162, and that "most other courts * * * have found *Belton* and *Thornton* dispositive of the question whether a search like the one at issue was incident to arrest." J.A. 162. The majority nevertheless believed that neither *Belton* nor *Thornton* addressed the "precise question" whether a vehicle search is incident to arrest if the *Chimel* justifications "no longer exist at the time of the search." J.A. 163.

Two justices dissented. J.A. 167-176. They concluded that the majority opinion conflicted with *Belton*'s bright-line rule, which neither depended on a "case-specific determination that there may be weapons or evidence in the automobile" nor required that the "presence of the *Chimel* rationales" be established in every case. J.A. 169-170. The dissenters noted that the New York state-court decision that *Belton* reversed and Justice Brennan's dissent in *Belton* both advanced the very argument that the majority had adopted, and that *Belton* had rejected it. J.A. 170-172. In addition, they concluded that the majority's case-by-case approach requiring the demonstrated presence of the *Chimel* rationales for every arrest conflicted with *Belton*'s intent

to establish a "straightforward rule" that would guide officers in the field and avoid after-the-fact, "case-by-case adjudication" of the risk to officers or evidence. J.A. 173-174.

SUMMARY OF ARGUMENT

In *Belton*, this Court adopted a bright-line rule to guide the officer in the field when the recent occupant of a vehicle is arrested: the officer may search the passenger compartment of the vehicle that the arrestee recently occupied as a contemporaneous incident of a lawful custodial arrest. The Arizona Supreme Court's decision in this case effectively overturns the *Belton* rule by converting it into a totality of the circumstances inquiry that asks whether, on the facts of a particular case, a search was necessary to protect officer safety or to preserve evidence. That case-specific approach provides officers with little practical guidance and should be rejected.

This Court's search-incident-to-arrest doctrine rests on the general need to protect officers from potential harm and to preserve evidence "whenever officers effect a custodial arrest" of the recent occupant of a vehicle. *Michigan* v. *Long*, 463 U.S. 1032, 1049 n.14 (1983). A custodial arrest is a volatile and dangerous event, with heightened risks that a suspect will grab for a weapon or attempt to conceal or destroy evidence of his guilt. This Court has thus long held that a search incident to arrest is per se reasonable regardless of whether the circumstances of the particular case involve one of the twin rationales for such a search. See *United States* v. *Robinson*, 414 U.S. 218, 235 (1973). Both *Belton* and *Thornton* reaffirmed that principle. Indeed, the Court in *Thornton* upheld a vehicle search that was conducted

after the defendant was handcuffed and secured in a patrol car. The Arizona Supreme Court's rule requiring a showing that each particular case involved a threat to officer safety or a risk of evidence destruction directly conflicts with more than three decades of this Court's precedents.

Under *Belton* and *Thornton*, the search of respondent's vehicle was valid. Respondent was a "recent occupant" of the car, he was subjected to a "lawful custodial arrest" next to the car, and the search of respondent's car was conducted as "a contemporaneous incident of that arrest." *Belton*, 453 U.S. at 460. Moments after respondent exited his vehicle, the police arrested him and promptly searched that vehicle in one continuous process.

The Arizona Supreme Court's decision eliminates the bright line drawn by *Belton* and incorrectly replaces it with an ad hoc, case-by-case approach that *Belton* itself found to be unworkable. *Belton* specifically recognized that it was "essential" to provide officers in the field with a "single familiar standard" for determining when the search of a car is authorized incident to an arrest. 453 U.S. at 458 (quoting *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979)). The Arizona Supreme Court's decision undermines that important objective by transforming a bright-line rule into a totality-of-the-circumstances test for determining whether a threat to officer safety or a need to preserve evidence in any particular case sufficiently justifies each search. J.A. 165-166. That inquiry accordingly reintroduces the very uncertainty and line-drawing difficulties that this Court sought to eliminate in *Belton*.

Belton has built-in limitations that have proved to be clear and workable. *Belton* applies only in the case of

the lawful arrest of a vehicle's "recent occupant" and only with respect to vehicle searches conducted as a "contemporaneous incident" to such an arrest. 453 U.S. at 460. A further narrowing of *Belton* to cases in which the police reasonably believe that evidence of the crime of arrest will be found in the vehicle makes little sense. Not only is such a recharacterization inconsistent with the Court's reasoning in *Belton*, it would disregard the officer-safety considerations that support *Belton*'s bright-line rule. It would also effectively render *Belton* superfluous because the automobile exception to the warrant requirement already authorizes vehicle searches based on probable cause. Indeed, imposing such a limitation on *Belton* would create irreconcilable tension with *Belton*'s existing limitations, which were developed consistent with *Belton*'s original rationale. Accordingly, the Court should reaffirm *Belton*'s bright-line rule authorizing a search of a vehicle's passenger compartment as a contemporaneous incident to the arrest of the vehicle's recent occupant.

ARGUMENT

A SEARCH OF A VEHICLE INCIDENT TO THE LAWFUL CUSTODIAL ARREST OF THE VEHICLE'S RECENT OCCUPANT IS LAWFUL EVEN WHEN THE ARRESTEE IS SECURED IN A PATROL CAR AT THE TIME OF THE SEARCH

A. *Belton* Authorizes The Warrantless Search Of A Vehicle's Passenger Compartment Where The Search Is A Contemporaneous Incident Of The Lawful Custodial Arrest Of The Vehicle's Recent Occupant

1. The Fourth Amendment to the Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against un-

reasonable searches and seizures, shall not be violated," and further provides that "no Warrants shall issue, but upon probable cause." U.S. Const. Amend. IV. This Court has long recognized that when officers have made a lawful arrest, a search of the person of the arrestee and area within his control "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States* v. *Robinson*, 414 U.S. 218, 235 (1973); see *Weeks* v. *United States*, 232 U.S. 383, 392 (1914).

Two longstanding rationales support the search-incident-to-arrest doctrine: the need "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape," and the need to prevent the "concealment or destruction" of evidence. *Chimel* v. *California*, 395 U.S. 752, 763 (1969); see *Knowles* v. *Iowa*, 525 U.S. 113, 116-117 (1998) (citing cases). Both rationales address practical difficulties generally associated with custodial arrests. Indeed, this Court has repeatedly recognized that custodial arrests are highly volatile and dangerous events. See, *e.g.*, *id.* at 117; *Robinson*, 414 U.S. at 234-235 & n.5. In 2006 alone, 9233 law enforcement officers were assaulted and 12 of the 48 officers feloniously killed in the line of duty were mortally wounded *while attempting arrests*. FBI, U.S. Dep't of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted*, Tables 19, 66 (2006) <http://www.fbi.gov/ucr/killed/2006/index.html> (*Uniform Crime Reports*); see FBI, U.S. Dep't of Justice, *Killed in the Line of Duty: A Study of Felonious Killings of Law Enforcement Officers* 3 (Sept. 1992). That is consistent with a well-established and dangerous pattern. Between 1997 and 2006, 133 of the 562 law enforcement officers who were feloniously killed in the line

of duty were slain in arrest situations, making the arrest by far the most dangerous situation that officers routinely confronted in that period. *Uniform Crime Reports* Table 19. In addition, the moment that an individual is placed under formal arrest, he has an increased motive "to take conspicuous, immediate steps to destroy incriminating evidence." *Cupp* v. *Murphy*, 412 U.S. 291, 296 (1973).

This Court accordingly has recognized that, "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape," and "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel*, 395 U.S. at 762-763. Further, the officer's need to protect himself and to preserve evidence justifies a search of the area within the arrestee's "immediate control," which the Court has described as "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Id.* at 763.

Because "potential dangers lurk[] in all custodial arrests," *United States* v. *Chadwick*, 433 U.S. 1, 14-15 (1977), the validity of a search incident to arrest "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." *Robinson*, 414 U.S. at 235. Instead, "[i]t is the fact of the lawful arrest which establishes the authority to search." *Ibid.*

2. In *New York* v. *Belton*, 453 U.S. 454 (1981), this Court applied those principles to define the permissible scope of a search incident to the arrest of the occupant of an automobile. *Belton* arose when a state trooper stopped a car for speeding and thereafter developed

probable cause to arrest the occupants for possession of marijuana. The officer ordered the occupants out of the car and placed them under arrest. *Id.* at 455-456. After "patt[ing] down" the arrestees and separating them, the officer searched the passenger compartment of the car and discovered cocaine. *Id.* at 456. The state courts suppressed that evidence on the ground that, when the search took place, "there [was] no longer any danger that the arrestee or a confederate might gain access to the article." *Ibid.* This Court reversed. *Id.* at 463.

The Court began by noting the principle that "a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area" from "within which [an arrestee] might gain possession of a weapon or destructible evidence." *Belton*, 453 U.S. at 457-458. The Court then explained that courts had struggled in applying that doctrine to the recurring question presented in *Belton*, namely, "whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile after the arrestees are no longer in it." *Id.* at 459. As the Court recognized, the lower courts were in "disarray" on that issue and had "found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant." *Id.* at 459-460 & n.1 (citation omitted).

The Court concluded that a "single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Belton*, 453 U.S. at 458 (citation omitted). "[T]o establish the workable rule [that]

this category of cases requires," the Court adopted "the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Id.* at 460 (quoting *Chimel*, 395 U.S. at 763). Based on that generalization, the Court held that whenever "a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Ibid.* (footnotes omitted).

The *Belton* Court emphasized that this rule, "while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." 453 U.S. at 461 (quoting *Robinson*, 414 U.S. at 235). In fact, it specifically recognized that the search could extend to containers that "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." *Ibid.* Just as is true with respect to the search of the person of the arrestee, if the arrest is lawful, then the "search [of the vehicle] incident to the arrest requires no additional justification." *Ibid.* (quoting *Robinson*, 414 U.S. at 235). In subsequent cases, this Court has specifically recognized the "bright-line" nature of *Belton*'s search-incident-to-arrest rule. See *Florida* v. *Thomas*, 532 U.S. 774, 776 (2001); *Long*, 463 U.S. at 1035 n.1, 1049 n.14 (1983).

3. In *Thornton* v. *United States*, 541 U.S. 615 (2004), the Court recently reaffirmed *Belton*'s bright-line rule in a factual context closely paralleling the present case. The officer in *Thornton* made contact with Thornton

immediately after he exited his car, noticed a bulge in Thornton's pocket, and asked Thornton whether he was carrying narcotics. *Id.* at 618. Thornton confessed that he was, and he pulled marijuana and crack cocaine out of his pockets. *Ibid.* The officer arrested him, handcuffed him, secured him in a patrol car, and subsequently searched Thornton's vehicle, where he found a handgun. *Ibid.*

The Court upheld the search, confirming that *Belton* established a "clear," "bright-line" rule that authorizes the search of a vehicle's passenger compartment incident to arrest "[s]o long as an arrestee is the sort of 'recent occupant' of the vehicle as [Thornton] was." *Thornton*, 541 U.S. at 623-624 & n.3. The Court recognized that it was "unlikely in this case" that the handcuffed arrestee could have returned to the passenger compartment and grabbed his gun, but concluded that "the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in *Belton*." *Id.* at 622. The Court emphasized that "[e]xperience has shown" the need for a "clear rule, readily understood by police officers" in the field that does "not depend[] on differing estimates of what items were or were not within reach of an arrestee at any particular moment." *Id.* at 622-623. The Court accordingly ruled that "[o]nce an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment." *Id.* at 623.

4. These precedents demonstrate that the search of respondent's vehicle was valid. Indeed, the relevant facts in this case are virtually indistinguishable from those surrounding the search upheld in *Thornton*.

There is no doubt that respondent was a recent occupant of his vehicle, because the police contacted him immediately after he got out of his car, when he was still within 8-12 feet of it. J.A. 152. It is also clear that the search was a "contemporaneous incident" of respondent's lawful arrest. The arrest and search were a single, uninterrupted, and rapid transaction of events. "Within minutes" of making contact with respondent, the officers had arrested him, handcuffed him, and placed him in the patrol car, and the search began immediately thereafter. *Ibid.*

Respondent contends (Br. in Opp. 16-19) that the search was not substantially contemporaneous with respondent's arrest, despite the facts that the search was performed within six minutes of the arrest and respondent remained on the scene throughout the search, because the scene was secure and the arrest was complete. According to this argument, the question whether a search is incident to an arrest depends not on whether the arrest and search are contemporaneous as a matter of time and space but rather on the relative security of the arrest scene.

This Court, however, has traditionally analyzed this question primarily along the dimensions of time and space, factors that are much more susceptible to objective measurement than "relative security." See, *e.g.*, *Chadwick*, 433 U.S. at 15 (search conducted long after defendant was taken into custody was not incident to arrest); *Preston* v. *United States*, 376 U.S. 364, 367 (1964) (search cannot be incident to arrest if it is remote in time from the arrest). The test for whether a search is contemporaneous with an arrest thus does not turn on whether the arrest scene is sufficiently secure at the time of the search, but on whether "the arrest and

search are so separated in time or by intervening events that the latter cannot fairly be said to have been incident to the former." *United States* v. *Abdul-Saboor*, 85 F.3d 664, 668 (D.C. Cir. 1996). Thus, a search is incident to an arrest so long as it is "roughly contemporaneous with the arrest," which means that the search is "conducted within a 'reasonable time' after obtaining control of the vehicle," and occurs "during a continuous sequence of events." *United States* v. *Hrasky*, 453 F.3d 1099, 1101-1102 (8th Cir. 2006) (upholding search conducted an hour after initial detention because the search was contemporaneous with decision to effect a full custodial arrest) (citations omitted), cert. denied, 127 S. Ct. 2098 (2007); see *United States* v. *Mapp*, 476 F.3d 1012, 1019 (D.C. Cir.) (search occurring approximately ten minutes after arrest was sufficiently contemporaneous), cert. denied, 127 S. Ct. 3031 (2007); *United States* v. *Weaver*, 433 F.3d 1104, 1106-1107 (9th Cir.) (upholding search initiated 10-15 minutes after arrestee was placed in patrol car), cert. denied, 547 U.S. 1142 (2006). That standard is amply satisfied here.

B. The Arizona Supreme Court's "Totality Of The Circumstances" Test Conflicts With This Court's Precedents

The Arizona Supreme Court incorrectly abandoned *Belton*'s bright-line rule and replaced it with an ad hoc test that will require case-by-case adjudication. That analysis would interject substantial and undesirable uncertainty into a commonly recurring factual context confronted by officers in the field. The court held that a *Belton* search of a vehicle's passenger compartment is not authorized where, "based on the totality of the circumstances, an arrestee is secured" and thus, in a court's judgment, "presents no reasonable risk to officer

safety or the preservation of evidence." J.A. 165-166. This case-by-case approach based on the "totality of the circumstances" cannot be squared with more than three decades of this Court's precedents, as well as the overwhelming weight of lower-court authority, which make clear that *Belton*'s applicability does not turn on whether the *Chimel* rationales were present in any particular case.

1. In *Robinson*, this Court held that a search incident to arrest of an arrestee's person is per se reasonable and, accordingly, permissible under the Fourth Amendment, regardless whether the circumstances of the particular case involve one of the twin rationales for such a search as a general matter. 414 U.S. at 235. The Court rejected the contention that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest" and explained that such authority "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." *Ibid.*

Belton itself applied that principle to vehicle searches that are a contemporaneous incident of the lawful custodial arrest of a "recent occupant" of the vehicle. 453 U.S. at 459-460. In doing so, the Court rejected the proposition—advanced by the state court in *Belton* and the dissenters in that case—that "[w]hen the arrest has been consummated and the arrestee safely taken into custody, the justifications [for a warrantless search] cease to apply," because "at that point there is no possibility that the arrestee could reach weapons or contraband." *Id.* at 465-466 (Brennan, J., dissenting); see *id.* at 456 (discussing state-court decision invalidating

search because there was "no longer any danger" that arrestee could access article). As Justice Brennan specifically emphasized in his dissenting opinion, *Belton*'s rationale squarely applies even after a recent occupant has been handcuffed and put in a patrol car. See *id.* at 468; see also *United States* v. *Wesley*, 293 F.3d 541, 548 (D.C. Cir. 2002).

Indeed, *Belton* illustrated the need for a "straightforward rule" by citing the different results previously reached in "comparable factual circumstances" by lower courts "decid[ing] whether * * * police may search inside the automobile after the arrestees are no longer in it." 453 U.S. at 459 & n.1 (citing, *e.g.*, *Hinkel* v. *Anchorage*, 618 P.2d 1069, 1069-1070 (Alaska 1980), cert. denied, 450 U.S. 1032 (1981), and *Ulesky* v. *State*, 379 So. 2d 121, 123 (Fla. Dist. Ct. App. 1979)). Both *Hinkel* and *Ulesky* involved situations in which the arrestee was in the back of the patrol car at the time that the vehicle was searched. The state court in *Hinkel* upheld the search of a purse retrieved from the vehicle as incident to the arrest. 618 P.2d at 1071-1072. The state court in *Ulesky*, by contrast, reasoned that, under the logic of *Chimel*, "once appellant was placed in the patrol car and thereby separated from her purse [in the vehicle], neither of the justifications for the search incident to arrest exception were present." 379 So. 2d at 126. While such reasoning would be consistent with a case-specific application of *Chimel*'s officer-safety and evidence-preservation rationales, it was precisely the uncertainty created by such case-by-case adjudication that *Belton* sought to displace by establishing a "workable rule" that would provide a "single familiar standard" in this critical and recurring context. *Id.* at 458, 460.

If there were any doubt about the bright-line nature of *Belton*'s holding, this Court's decision in *Thornton* should have removed it. The petitioner in *Thornton*, who had been handcuffed and placed in a patrol car before his vehicle was searched, argued that the search was invalid in part because, on the particular facts of his case, he could not have readily accessed the passenger compartment of his car. 541 U.S. at 618, 622. In response, the Court noted that the passenger compartment and contraband in *Belton* itself were "no more inaccessible" and that *Belton* was not based on a case-by-case assessment of the chance that an arrestee might retrieve a weapon from his car. *Id.* at 622-623. Rather, the Court explained, the danger, stress, and uncertainty arising from custodial arrests in general, and the need for a "clear rule" to guide police in that fluid situation, justify *Belton*'s generalization that "it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment." *Id.* at 621, 623. As the Court explained, "[e]xperience has shown" that the "*Chimel* principle ha[s] prove[n] difficult to apply in specific cases" and that a rule based on "ad hoc determinations on the part of officers in the field and reviewing courts" was "impracticable" in this context. *Id.* at 620, 623.

Thus, far from leaving open the question, *Belton* and *Thornton* plainly reject the view that each vehicle search incident to arrest must be justified, under the totality of the circumstances of each case, with the demonstrated presence of one of the *Chimel* rationales. Unsurprisingly, then, the lower courts across the country have routinely and virtually unanimously applied *Belton* to situations in which the recent occupant of a car was arrested, handcuffed, and placed in a squad car before

his vehicle was searched.[1] The Arizona Supreme Court erred in reaching the contrary conclusion.

C. A Rule Requiring Proof Of A Threat To Officer Safety Or A Need To Preserve Evidence Under The "Totality Of The Circumstances" Of Each Case Would Obfuscate *Belton*'s Bright-Line Rule

1. The Arizona Supreme Court's decision dissolves the bright-line rule adopted by *Belton*. It would create the same sort of uncertainty from the standpoint of the officer in the field and disarray in the case law that this Court specifically sought to remedy in *Belton* and *Thornton*. See also *Wyoming* v. *Houghton*, 526 U.S. 295, 305-306 (1999) ("When balancing the competing

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[1] See, *e.g.*, *Mapp*, 476 F.3d at 1015, 1017-1019; *Wesley*, 293 F.3d at 545-549 & n.8 (citing cases); *United States* v. *Doward*, 41 F.3d 789, 791 & n.1 (1st Cir. 1994) (citing cases), cert. denied, 514 U.S. 1074 (1995); *United States* v. *Milton*, 52 F.3d 78, 80 (4th Cir.), cert. denied, 516 U.S. 884 (1995); *United States* v. *White*, 871 F.2d 41, 44 (6th Cir. 1989); *United States* v. *Sholola*, 124 F.3d 803, 817-818 & n.15 (7th Cir. 1997) (citing cases); *United States* v. *Mitchell*, 82 F.3d 146, 152 (7th Cir.), cert. denied, 519 U.S. 856 (1996); *United States* v. *Karlin*, 852 F.2d 968, 970-971 (7th Cir. 1988), cert. denied, 489 U.S. 1021 (1989); *Hrasky*, 453 F.3d at 1100, 1103; *Conrod* v. *Davis*, 120 F.3d 92, 94 (8th Cir. 1997), cert. denied, 523 U.S. 1081 (1998); *Weaver*, 433 F.3d at 1107; *United States* v. *Osife*, 398 F.3d 1143, 1144, 1146 (9th Cir.), cert. denied, 546 U.S. 934 (2005); *United States* v. *Humphrey*, 208 F.3d 1190, 1202 (10th Cir. 2000); *Rainey* v. *Commonwealth*, 197 S.W.3d 89, 91, 95 (Ky. 2006), cert. denied, 127 S. Ct. 1005 (2007); *People* v. *Daverin*, 967 P.2d 629, 631-632 (Colo. 1998); *People* v. *Bailey*, 639 N.E.2d 1278, 1281-1282 (Ill. 1994), cert. denied, 513 U.S. 1157 (1995); *State* v. *Hensel*, 417 N.W.2d 849, 852-853 (N.D. 1988); *State* v. *Stroud*, 720 P.2d 436, 437-438 (Wash. 1986); *State* v. *Fry*, 388 N.W.2d 565, 567, 577 (Wis.), cert. denied, 479 U.S. 989 (1986); see also 3 Wayne R. LaFave, *Search and Seizure* § 7.1(c) at 517 & n.89 (4th ed. 2004) ("[U]nder *Belton* a search of the vehicle is allowed * * * even after the defendant was removed from it, handcuffed, and placed in the squad car.") (citing cases).

interests, our determinations of reasonableness under the Fourth Amendment must take account of * * * practical realities" such as the "bog of litigation * * * in the form of both civil lawsuits and motions to suppress in criminal trials" that would result from a rule that turns on post hoc inquiries into subjective beliefs of individuals or subtle factual distinctions.).

In *Belton*, the Court emphasized the need to provide police officers with a clear, easily administered rule for the dangerous and recurring situation involving the arrest of the recent occupant of a vehicle, 453 U.S. at 458, acknowledging that "practical necessity requires that we allow an officer in these circumstances to secure thoroughly the automobile without requiring him in haste and under pressure to make close calculations about danger to himself or the vulnerability of evidence." *Robbins* v. *California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring in judgment). "A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'" *Belton*, 453 U.S. at 458 (citation omitted).

The Arizona Supreme Court's decision reintroduces the very uncertainty and subtlety that *Belton* sought to foreclose. Under the court's decision, the determination whether *Belton* permits the search of an arrestee's car will require an individualized determination of whether, at the time of the search and "based on the totality of the circumstances," the arrest scene has been "secured" to the point that any threats to officer safety or evidence preservation are sufficiently remote that a search is not

justified. J.A. 165-166. That inquiry revitalizes the case-by-case *Chimel* analysis that the Court found unworkable in *Belton*. Returning to that regime would require law enforcement personnel to make a variety of ad hoc determinations—subject to second-guessing by a court—in the limited time that they have to assess the situation after arresting the recent occupant of a vehicle, *Belton*, 453 U.S. at 458, in the manner previously found "impracticable" by this Court. *Thornton*, 541 U.S. at 623.

The uncertainty of such an approach is highlighted by the Arizona Supreme Court's reliance on the "totality of the circumstances" in determining whether "an arrestee is secured." J.A. 165-166. That reliance implicitly recognizes that whether an arrestee is "secured" necessarily is a question of degree. The series of steps that often follow custodial arrests can incrementally reduce the risk that an arrestee will free himself and either harm an officer or destroy evidence. Conducting an initial pat-down, applying handcuffs, performing a full search of the arrestee's person, separating the arrestee from others, placing the arrestee in a patrol car, and, ultimately, detaining the arrestee in a secure holding facility will each undoubtedly reduce such risk. At least in the relatively short period of time while officers remain at the scene of an arrest with the arrestee, however, there is no readily identifiable point at which a scene may reliably be said to be fully secure. Even when law enforcement officers have handcuffed an arrestee and placed him in a patrol car, arrestees occa-

sionally free themselves from their handcuffs, escape, and attempt to harm the officers.[2]

Under the decisions below, determining whether an arrestee is sufficiently "secured" may depend in part on the number of officers on the scene in relation to the number of arrestees, bystanders, or both. The Arizona Supreme Court distinguished this case from *Belton* on that basis, concluding that the lone officer faced "an obvious threat to [his] safety" from the four vehicle occupants in that case. J.A. 158. Of course, the number of officers, arrestees, and bystanders varies from case to case, and also may change during the arrest itself.

Other factors relevant to the "totality of the circumstances" approach affecting the analysis in any particular case would include whether the arrestees are placed in handcuffs or other constraints; whether their hands

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[2] See, *e.g.*, *Mason* v. *United States*, 120 Fed. Appx. 40 (9th Cir. 2005) (suspect handcuffed and locked in back of car kicked out window, escaped, freed hands, and grabbed agent's gun); *Smith* v. *Cupp*, 430 F.3d 766 (6th Cir. 2005) (suspect handcuffed in back of car climbed over seat to front, put car in gear, and attempted to run over officer); *Plakas* v. *Drinski*, 19 F.3d 1143, 1145 (7th Cir.) (suspect handcuffed in backseat of squad car escaped from squad car and later confronted police), cert. denied, 513 U.S. 820 (1994); *United States* v. *Sanders*, 994 F.2d 200, 210 & n.60 (5th Cir.) (citing incidents in which police officers were slain by handcuffed arrestees), cert. denied, 510 U.S. 955 (1993); see also Americans for Effective Law Enforcement Amicus Br. 11-12 (citing cases); *Doward*, 41 F.3d at 793 n.5 (discussing "the unpredictable developments ultimately confronting" police in *Belton* context, including the possibility that bystanders or unknown confederates in the area may approach the vehicle); *id.* at 791-793 & n.1; *Forge* v. *City of Dallas*, No. 3-03-CV-0256-D, 2003 WL 21149437, at *1 (N.D. Tex. May 19, 2003) (arrestee who was handcuffed and secured with a seatbelt in a locked patrol car "suddenly and without warning * * * slipped out of his handcuffs, released the seat belt latch, opened the locked car door, and tried to escape from custody").

are cuffed behind or in front; the relative (and changing) locations of the officers, arrestees, bystanders, and the car; whether the arrestees are placed in patrol cars, where those cars are located, whether they are equipped with a prisoner cage, whether their doors or windows are open; and whether the officers monitor the cars during the search. The inquiry would also depend on the size, strength, criminal history, and other characteristics of the arrestees and bystanders, as well as whether the arrestees act nervous, agitated, compliant, or hostile or whether the arrestee poses a greater than average risk of escaping restraints (with large wrists and small hands). The time of day or night might also be relevant, along with the relative density of the area and dangerousness of the neighborhood. The possibility of a confederate's late arrival would also have to be factored in. Officers would be required to make on-the-spot judgments as to these and numerous other factors to determine whether the scene is sufficiently "secure" to preclude a vehicle search. The need to monitor the changing dynamics of the arrest scene would eliminate the simplicity and predictability on which *Belton* predicated its bright-line rule and would mark a return to the uncertain and hazardous world that existed for officers in the field before *Belton*. See 453 U.S. at 459.

2. The Arizona Supreme Court suggested that applying *Belton*'s bright-line rule without a case-specific determination of whether the *Chimel* rationales were present would cut the search-incident-to-arrest doctrine adrift from its traditional "constitutional moorings" as set forth in *Chimel*. J.A. 163-164. Although this Court has found that most Fourth Amendment situations are not amenable to bright-line rules, see *United States* v. *Drayton*, 536 U.S. 194, 201 (2002), it has traditionally

developed clear, per se rules in cases where such a rule would provide meaningful protection to officers in hazardous situations without unduly infringing on citizens' privacy. For example, in *Robinson*, as discussed above, the Court announced a per se rule authorizing a search incident to arrest of the arrestee's person, regardless of whether the person posed any threat to the officer in a particular situation. See 414 U.S. at 235.

Similarly, in *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (per curiam), the Court held that police officers executing a traffic stop may order the driver to exit the vehicle, regardless of whether the officer has any reason to suspect that the driver threatens his safety. See *id.* at 110-111. The Court explained that this per se rule was justified by the government's "legitimate and weighty" concerns for officer safety and the relatively slight intrusion on the driver's liberty or privacy. *Ibid.* Later, in *Maryland* v. *Wilson*, 519 U.S. 408 (1997), the Court extended *Mimms* to passengers of a stopped car. The Court rejected the respondent's contention that a bright-line rule was unwarranted because it would allow officers to detain passengers even when they posed no reasonable risk to officer safety, which was the only rationale justifying the seizure. *Id.* at 413 n.1. Instead, the Court concluded that the danger to officers arising from traffic stops in general justifies a per se rule allowing the police to order passengers out of the vehicle, regardless of whether those passengers pose a reasonable risk to the officers in the particular case. *Id.* at 413-414.

This Court has also adopted a bright-line rule authorizing police, when executing a search warrant, to detain any occupants of the premises being searched, without requiring a case-by-case analysis of whether those occu-

pants pose a risk in each individual case. *Michigan* v. *Summers*, 452 U.S. 692 (1981). The Court again concluded that the generally dangerous situation of executing a search warrant justifies the intrusion, even where there is no reason to believe that the bystanders threaten the officers' safety. See *id.* at 702-703 ("Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence."). Accordingly, the Court concluded that "the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Ibid.*

All of these per se rules are overinclusive in the sense that they allow officers to take actions to protect themselves in situations that are potentially dangerous as a general matter, even though in many (if not most) particular instances, there may be no readily identifiable threat to officer safety. But the magnitude of the interest being protected—officer safety—and the difficulty of isolating (before the fact) *only* true threats justifies broader authority under the Fourth Amendment.

3. A bright-line rule is appropriate in the *Belton* context. As this Court has repeatedly held, custodial arrests in general are dangerous and fluid situations giving rise to concerns for officer safety and preservation of evidence. See *Thornton*, 541 U.S. at 621; *Robinson*, 414 U.S. at 234 n.5. Indeed, much of the risk inherent to such arrests results from the *uncertainty* that an officer must confront in situations where the officer often may lack knowledge of factors increasing his risk of harm. Thus, while an officer must have probable cause to arrest an individual, the unknown characteristics of that

individual and the surrounding environment warrant a bright-line rule that sufficiently protects officers in the field while executing custodial arrests.

The balance of constitutional interests strongly favors *Belton*'s clear and workable rule for vehicle searches incident to arrest. As noted, officer safety, evidence preservation, and the practical need for an easily administrable rule in this frequently recurring factual context weigh heavily in favor of permitting vehicle searches contemporaneous to the arrest of a recent occupant of the vehicle.

Furthermore, an arrestee's expectation of privacy in his automobile's passenger compartment, while not insignificant, is "limited." *Robbins*, 453 U.S. at 431 (Powell, J., concurring in judgment). Because automobiles necessarily travel through public thoroughfares in plain view, are pervasively regulated by states, "periodically undergo official inspection," and are "often taken into police custody in the interests of public safety," individuals have only a diminished expectation of privacy in a vehicle's passenger compartment. *Chadwick*, 433 U.S. at 12-13; see *Houghton*, 526 U.S. at 303. That privacy interest is "diminished further when the occupants are placed under custodial arrest." *Robbins*, 453 U.S. at 431 (Powell, J., concurring in judgment); cf. *United States* v. *Edwards*, 415 U.S. 800, 808-809 (1974) ("While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.") (citation omitted). Indeed, an individual's expectation of privacy concerning the passenger compartment of a vehicle is reduced even further by the fact that, in many instances, the Fourth

Amendment permits police to impound such vehicles and to inventory their contents. See *Colorado* v. *Bertine*, 479 U.S. 367, 371-372 (1987); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976); *Cooper* v. *California*, 386 U.S. 58 (1967). Thus, as Justice Powell explained, "*Belton* trades marginal privacy of containers within the passenger area of an automobile for protection of the officer and of destructible evidence," and the "balance of these interests strongly favors the Court's rule." *Robbins*, 453 U.S. at 431.

D. The *Belton* Doctrine Is Straightforward And Workable

1. The Arizona Supreme Court's abandonment of *Belton*'s bright-line approach to vehicle searches was animated in part by its concern that the demonstrated presence of the *Chimel* rationales in each case was necessary to provide needed limits to the *Belton* rule. See J.A. 158-159. That concern is unfounded because *Belton* has built-in limitations that have proven to be clear, workable, and sound in the mine run of cases.

First, *Belton* applies only when the arrestee is the vehicle's "recent occupant." 453 U.S. at 460; *Thornton*, 541 U.S. at 622. When the police confront and arrest the individual while he is in the car or right after he exits the car, it is clear that *Belton* applies. See *id.* at 623-624 ("So long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest."). Although, as the lower courts have recognized, there comes a point at which the suspect can no longer be reasonably regarded as a "recent occupant" of the vehicle because of a significant lapse of time or distance from the arrestee's point of departure from his car, that difficulty does not arise in most searches incident to arrest where

the arrest and search occur as part of a short and uninterrupted series of events.[3] Moreover, time and distance—unlike relative security—are at least susceptible to objective measurement and therefore an administrable test.

Second, *Belton* requires that the search of the vehicle be undertaken as "a contemporaneous incident of th[e] arrest." 453 U.S. at 460. A search generally meets the contemporaneous-incident standard if it is an "integral part of a lawful custodial arrest process," such that the search and arrest are fairly regarded as "one continuous event." *Abdul-Saboor*, 85 F.3d at 668-669 (citation omitted). Contrary to the suggestion of the Arizona Supreme Court (J.A. 158-159), the determination of whether a vehicle search is a "contemporaneous incident" to an arrest is straightforward and workable, and it sensibly limits *Belton* searches to instances where the search is genuinely part of the arrest process. Accordingly, most courts have correctly concluded that *Belton* does not authorize the search of a vehicle if the arrestee or his vehicle has been removed from the scene before the search is conducted, or if the search has not been conducted within a reasonable time of the arrest. See, *e.g.*, *United States* v. *Wells*, 347 F.3d 280, 287 (8th Cir. 2003), cert. denied, 541 U.S. 1081 (2004); *United States* v.

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[3] See, *e.g.*, *United States* v. *Strahan*, 984 F.2d 155, 159 (6th Cir. 1993) (*Belton* does not apply where arrestee was "approximately thirty feet from his vehicle when arrested"); *Dean*, 76 P.3d at 437 (arrestee was not "recent occupant" under *Belton* where "[h]e had not occupied the vehicle for some two and one-half hours," and was found hiding in the attic of a nearby house); *State* v. *Porter*, 6 P.3d 1245, 1249 (Wash. Ct. App. 2000) (*Belton* does not apply where individual was arrested 300 feet from vehicle).

Lugo, 978 F.2d 631, 634-635 (10th Cir. 1992); *Hrasky*, 453 F.3d at 1102-1103.

2. In an opinion concurring in the judgment in *Thornton*, Justice Scalia proposed an additional limiting principle to govern the *Belton* rule. See 541 U.S. at 625-632. Believing that the typical *Belton* search occurs only after the suspect is secure, *id.* at 625-629, Justice Scalia suggested narrowing *Belton* to vehicle searches conducted when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 632.

That alternative rule is unwarranted. If there are reasonable grounds to believe that a vehicle contains evidence of a crime, a warrantless search of that car would be based on probable cause, see *Houghton*, 526 U.S. at 302; *Ornelas* v. *United States*, 517 U.S. 690 (1996), and, thus, would be lawful under the automobile exception to the warrant requirement. See *Maryland* v. *Dyson*, 527 U.S. 465, 466-467 (1999) (per curiam); *Houghton*, 526 U.S. at 300-301. The proposed restriction on *Belton*, thus, is effectively subsumed within distinct Fourth Amendment doctrines. As such, it would serve no independent purpose and would risk substantial doctrinal confusion among the lower courts.[4]

Moreover, recasting *Belton* as based upon police interest in gathering evidence related to the crime of ar-

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[4] The "reasonable to believe" formulation suggested by Justice Scalia presumably refers to probable cause and not a novel standard between probable cause and reasonable suspicion. This Court has properly rejected the invitation to create such a "third verbal standard" because creating new and "subtle verbal graduations may obscure rather than elucidate the meaning" of the "constitutional requirement of reasonableness." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 541 (1985).

rest would create irreconcilable tension with the logic of *Belton*'s current limitations. If the reasonable belief that evidence will be found, combined with the arrestee's diminished expectation of privacy in the automobile context, justifies a warrantless search of the car, it is not clear why the doctrine should be limited to situations where the arrestee was a recent occupant of the vehicle and the search was contemporaneous with the arrest. The new rationale would also seem to justify a search of the trunk, as well as the passenger compartment and containers within. Nor is it clear why the limitation to evidence of the crime of the arrest makes any sense. Unless one entirely accepts that no appreciable risk of destruction of evidence exists in a typical *Belton* search, cf. *Thornton*, 541 U.S. at 625-629 (Scalia, J., concurring in the judgment), the temptation to destroy evidence presumably will be just as great in the case of evidence of a crime more serious than the crime of arrest. Thus, transforming *Belton* along the lines suggested would create confusion both in actual practice and in the underlying logic of *Belton* searches.

Finally, recharacterizing *Belton* in the manner suggested by Justice Scalia's *Thornton* concurrence cannot be squared with the rationale of *Belton* itself. Justice Stevens concurred in the judgment in *Belton* because he would have held that the "automobile exception" to the warrant requirement authorized the search because the officers had "probable cause to believe the vehicle[] contained contraband." *Robbins*, 453 U.S. at 444, 449-452 & n.13 (Stevens, J., dissenting); see *Belton*, 453 U.S. at 463 (Stevens, J., concurring in the judgment) (adopting rationale in *Robbins* dissent). But the State in *Belton* never argued that the vehicle search was lawful on that ground, *Robbins*, 453 U.S. at 452 n.15 (Stevens, J., dis-

senting), and *Belton* made clear that its holding did not rest on the automobile exception, which "proceeds on a theory wholly different from that justifying [a] search incident to an arrest" and is "not dependent on the right to arrest," *Chambers* v. *Maroney*, 399 U.S. 42, 49 (1970) (quoting *Carroll* v. *United States*, 267 U.S. 132, 158 (1925)). See *Belton*, 453 U.S. at 462 n.6 (citing *Chambers*); see also *id.* at 463 (Rehnquist, J., concurring) (concurring "because the Court does not find it necessary to consider the 'automobile exception' in its disposition"); *id.* at 472 (White, J., dissenting) (*Belton* authorizes searches without "probable cause to believe that contraband or evidence of crime will be found"). Rather than recast *Belton* as a rule about evidence-seeking searches, the Court should reaffirm that *Belton* rests on the traditional justifications of the search-incident-to-arrest doctrine—officer safety and evidence preservation—in the recurring context of vehicle searches following the arrest of a recent occupant.

CONCLUSION

The judgment of the Supreme Court of Arizona should be reversed.

Respectfully submitted.

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STATE OF ARIZONA,

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—v.—

RODNEY JOSEPH GANT,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARIZONA

BRIEF *AMICUS CURIAE* OF THE ACLU AND THE ACLU OF ARIZONA IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members. The ACLU of Arizona is one of its stateside affiliates. *Amici* are dedicated to ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice systems, and preserving the principles of liberty and equality embodied in the Bill of Rights.

STATEMENT OF THE CASE

In late August, 1999, two Tucson police officers went to a home to investigate a tip about narcotics activity. After Rodney Gant came to the door and informed the officers that the homeowner would return later that afternoon, the officers departed. Upon running a records check on Gant, the officers discovered that his driver's license had been suspended and that he was the subject of an arrest warrant for driving with a suspended license.

After the officers returned to the home that evening, Gant drove up, parked in the driveway, and got out of his car. One of the officers summoned him.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

As soon as Gant covered the eight-to-twelve-foot distance between them, the officer arrested and handcuffed him, then placed him in the rear of a patrol car, under the supervision of another officer. Two officers then searched the passenger compartment of Gant's vehicle, finding a weapon and a baggie of cocaine.

Gant was charged with possession of a narcotic for sale and possession of drug paraphernalia. After the trial court denied his motion to suppress the evidence found in his car, he was convicted of both offenses. The Arizona court of appeals reversed the denial of Gant's suppression motion and his convictions. *State v. Gant*, 43 P.3d 188 (2002). This Court then vacated the court of appeals opinion and remanded the case for reconsideration in light of an intervening state court decision. *Arizona v. Gant*, 540 U.S. 963 (2003). Following an evidentiary hearing, the trial court again denied the motion to suppress, the court of appeals again reversed that decision, *State v. Gant*, 143 P. 3d 379 (2006), and the Arizona Supreme Court affirmed *State v. Gant*, 216 Ariz. 1 (2007).

The state petitioned this Court for a writ of *certiorari* to the Supreme Court of Arizona. On February 25, 2008, this Court granted the writ.

SUMMARY OF ARGUMENT

In *Chimel v. California*, 395 U.S. 752 (1969), this Court concluded that searches incident to arrest rested on the twin justifications of officer safety and evidence preservation. These rationales dictated a

limitation of the scope of the search to the person of an arrestee and the area within his immediate control. In *New York v. Belton*, 453 U.S. 454 (1981), the Court declared an entire passenger compartment of a car to be within an arrestee-occupant's immediate control. The Court then decided that a search of that area was reasonable even though an arrestee was not inside the vehicle if he was a "recent" occupant. This unexplained expansion of the scope of search incident authority cannot be reconciled with the *Chimel* justifications. Because the vast majority of *Belton* searches occur when arrested occupants are under official control and no longer have access to vehicles, weapons inside passenger compartments pose no safety threats and evidence inside passenger compartments is not at risk. *Amici* respectfully suggest that *Belton*'s grant of authority to conduct warrantless and causeless searches under these circumstances is unjustifiable and should be abandoned.

The possibility that some police officers may choose to leave arrestees unrestrained if necessary to justify a vehicle search is insufficient reason to maintain *Belton*. First, it should not be assumed that police officers will place their own safety and the safety of others in jeopardy. More fundamentally, an unreasonable search cannot and should not be justified based on unreasonable police practices designed to avoid Fourth Amendment safeguards. In addition, in a case where an arrest is for a nonevidentiary offense—*i.e.*, an offense that provides no basis for believing that evidence will be found nearby–*Belton* authority cannot be justified by the

state's general interest in evidence gathering. In that situation, an evidence-gathering search is a wholly unjustified fishing expedition.

This case highlights the serious constitutional flaws in the *Belton* rule. After being arrested for driving with a suspended license, Gant was properly restrained in a police car. He posed no safety risk. He could no longer tamper with or destroy any evidence in the car. And, given the nature of his offense, there was no reason to believe that the car contained any evidence of the crime for which he was arrested. The search of the vehicle therefore violated the Fourth Amendment and *Belton* should be overruled to the extent it says otherwise. There is no reason in this case to decide whether an evidence-gathering rationale could render an automatic vehicle search reasonable following an arrest for an offense that might involve evidence. This Court should reserve that question for a case where it is actually raised.

However, if the Court addresses the constitutionality of a vehicle search after the arrest of an occupant for an offense that *might* involve evidence, it should declare that an arrest alone does not justify an exploration of vehicle contents. The constitutional text, history, and a long line of precedents all point toward one unavoidable conclusion—probable cause to search is a *sine qua non* for a reasonable evidentiary search of a vehicle. A mere arrest for an offense that "might" entail evidence does not, by itself, establish the "fair probability" required for probable cause *to search*.

Moreover, the balance of interests cannot support diminution of the Fourth Amendment norm in this context. An arrest for an evidentiary offense does not decrease the severity of the intrusion upon individual privacy interests and there are no heightened or uniquely weighty government interests in the balance. The Court should not revive a discredited evidence-gathering rationale that predated and was resoundingly and properly rejected in *Chimel*.

A decision by this Court that police officers may not rely on a risk of physical danger or destruction of evidence to search a vehicle when neither concern is present will still leave law enforcement with ample authority to conduct vehicle searches. The inventory doctrine, the "automobile exception," and the broad authority to search pursuant to voluntary consent will justify many of the searches currently permitted by *Belton*. Overruling *Belton* will not unduly tie the hands of the police, but will, however, ensure that routine police practices conform to traditional Fourth Amendment principles.

ARGUMENT

I. THE TWIN JUSTIFICATIONS THAT UNDERLIE THE *CHIMEL* DOCTRINE CANNOT SUPPORT AUTOMATIC AUTHORITY TO SEARCH VEHICLES INCIDENT TO THE ARREST OF RECENT OCCUPANTS

A. *Belton*'s Extension Of Search Incident To Arrest Authority Has Undermined The *Chimel* Court's Effort to Rationalize and Stabilize The Doctrine

The history of the search incident to arrest doctrine is scarred by disconcerting instability. During the half century following the Court's first allusion to the doctrine in dictum,[2] the scope of the authority accorded law enforcement "underwent at least five radical course changes."[3] In *Chimel* the Court strove to stabilize and rationalize the doctrine.[4] *Chimel* recognized two justifications for the authority to conduct causeless, warrantless searches incident to arrests—to ensure officer safety

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[2] *See Weeks v. United States*, 232 U.S. 383, 392 (1914).

[3] James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 200 U. ILL. L. REV. 1417 (2007). For a description of this period, see *id.* at 1421-1429.

[4] The Court was unanimous regarding reform of search incident to arrest authority. Two dissenters disagreed with the result only because they believed that probable cause to search and an exigency had been demonstrated. *Chimel*, 395 U.S. at 780, 781-82 (White, J., dissenting).

and to preserve evidence. *Id.* at 762-63.[5] Acknowledging that weapons pose threats and that evidence is jeopardized *only* if they are accessible to an arrestee, the Court declared that a search incident to arrest could no longer extend beyond the person of the arrestee and "the area that was 'within his or her *immediate* control'" at the time of arrest—that is, "the area into which an arrestee *might reach* in order to grab a weapon or evidentiary items." *Id.* at 763 (emphasis added).

In *Belton,* the Court confronted lower court uncertainty over the proper scope of a search incident to the arrest of a vehicle occupant. To furnish needed guidance *and* based on a belief that vehicle occupants "generally, even if not inevitably," can reach weapons or evidence anywhere within the "narrow compass of the passenger compartment," the majority announced that passenger compartments and containers located there are within an arrestee-occupant's *immediate* control. *Id.* at 460.[6]

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[5] It is critical to recognize that the search incident to arrest doctrine suspends the substantive showing ordinarily needed for a reasonable search—probable cause. The doctrine demands no particularized showing that weapons or evidence will be found. A lawful arrest alone triggers search incident authority. *See United States v. Robinson,* 414 U.S. 218, 235 (1973).

[6] One enduring ambiguity is whether *locked* containers are included. The majority referred merely to "closed or open" containers, *Belton,* 453 U.S. at 461 n.4, while a dissent complained that "locked" containers could be searched. *See id.* at 472 (White, J., dissenting).

The majority also decided that officers could conduct thorough searches of passenger compartments and private belongings when the arrestee was a "recent occupant" of the vehicle searched, *i.e.*—that is, when the arrested individual was an occupant "just before" the arrest. *Id.* at 462. The Court did not explain *why* passenger compartment contents should be subject to warrantless, causeless searches when an occupant is outside the vehicle when arrested and when the search occurs. This substantial expansion of search incident authority was not reconciled with and, indeed, is quite irreconcilable with *Chimel*'s core premise—that weapons pose threats and that evidence is at risk only when they are within an arrestee's reach. 395 U.S. at 762-63.[7]

B. The Time Is Ripe To Abandon *Belton*'s "Extreme Extension" Of Search Incident To Arrest Authority

The Court *could* affirm the ruling below on the narrow, fact-specific ground relied upon by a majority of the Arizona Supreme Court. Confining a

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[7] Although the *Belton* majority proclaimed fidelity to *Chimel*, a dissent described how the Court had increased the scope of search incident to arrest authority. *Belton*, 453 U.S. at 466 (Brennan, J., dissenting). Indeed, Justice White deemed *Belton* an "extreme extension" of *Chimel*. *Id.* at 472 (White, J., dissenting); *see also Thornton v. United States*, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part) (referring to the "erosion" of Fourth Amendment protection that "is a direct consequence" of *Belton*); *id.* at 633 (Stevens, J., dissenting) (observing that *Belton* "allowed...a broader search than" *Chimel*).

handcuffed suspect in a police car surely eliminates the only threats that can justify *Belton* searches. *See State v. Gant*, 162 P. 3d 640, 643-44 (2007).[8] The dissent below nonetheless read *Belton* to authorize an intensive search whenever an arrestee *was* recently within a vehicle and the search is contemporaneous with the arrest—whether or not the *Chimel* dangers are conceivably present at the time of the search.[9] The fact that *Belton* is so unclear and malleable that it can be interpreted to support such divergent outcomes is just one reason why the Court should undertake wholesale reform. Further refinement of *Belton* will only yield further

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[8] In *Thornton*, the Court acknowledged that "an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search." 541 U.S. at 622. Perils posed by persons other than the arrestee have not served as justifications for automatic searches incident to arrest. Upholding the search here because others might have gained access to Gant's car would not only be unprecedented and unjustified, it would expand a doctrine that has already exceeded constitutionally legitimate bounds.

[9] The analysis of the Arizona court's majority is *far* preferable to that of the dissent. *Belton's* fictions have temporal and spatial limits. The obvious concern with unprincipled expansion of automatic authority to search that underlies these constraints supports the conclusion that a search is reasonable *only* when an arrestee is near enough to make access a genuine possibility. That spatial restriction is essential to cabin *Belton's* overbroad bright-line authority. Bright line rules are constitutionally defensible *only* when they "generally, even if not inevitably" produce the same results that case-by-case adjudication would produce. *See Belton*, 453 U.S. at 460. They must fairly approximate reality.

confusion.[10] More important, it will perpetuate the flawed constitutional reasoning that has rendered *Belton* questionable from the outset.

Four years ago, in *Thornton v. United States*, 541 U.S. 615 (2004), a splintered Court held that *Belton* permits a thorough search even though officers first contact an arrestee outside a vehicle. It was apparent then that *Thornton*, which involved a handcuffed arrestee sitting in the back of a police car during the search, was representative of the vast majority of *Belton* searches. *See id.* at 628 (Scalia, J., concurring in the judgment). Officers routinely perform warrantless, causeless vehicle searches putatively justified by safety and evidence preservation concerns when there are positively no risks because the areas searched are entirely inaccessible to arrested occupants. Responding to this irrational, constitutionally intolerable state of affairs, Justice Scalia proposed "honest" reform. *Id.* at 631 (Scalia, J., concurring in the judgment). This case furnishes a clear opportunity for such reform. Nearly a century after the Court fist adverted to the

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[10] The Arizona Supreme Court's division here and the lower court split over *Belton*'s application to confined arrestees illustrate the confusion engendered by the doctrine. The controversy settled in *Thornton*—whether an arrestee must be in a vehicle when first approached—and other issues that continue to arise prove that efforts to clarify by refining *Belton's* standards are futile. A doctrine adopted primarily because it could provide bright-line guidance, *see Belton*, 453 U.S. at 458-60, surely is due for a major overhaul when it engenders such ambiguity and confusion. *See* Tomkovicz, *supra* note 3, at 1444 n.177.

authority to search arrestees, see *Weeks v. United States*, 232 U.S. 383, 392 (1914), the time is ripe to revisit vehicular searches incident to arrests of occupants and to end the unjustifiable privacy invasions spawned by *Belton*.[11]

C. Officer Safety And Evidence Preservation Concerns Do Not Justify Passenger Compartment Searches Incident To Arrests Of Occupants

The vast majority of *Belton* searches occur today when arrestees cannot reach passenger compartments. *Thornton*, 541 U.S. at 628-29 (Scalia, J., concurring in the judgment).[12] The authority to search cannot be justified as bright-line guidance reflecting a fair approximation of the relevant interests. In fact, officers routinely invade privacy when there is not even a remote chance of the dangers that supposedly support their searches. *Id.* at 628. These searches, entirely unjustified by safety or evidentiary concerns, are nothing other than the "'exploratory searches'" categorically forbidden by the Fourth Amendment. *Id.* (quoting *United States v.*

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[11] The unquestioned authority to search arrestees' persons is not at issue. The *only* issue here is the reasonableness of an automatic vehicle search following an arrest for an offense that involves no cognizable prospect of finding evidence—driving with a suspended license.

[12] Justice Scalia entertained the possibility that it *may* have once been "true that the passenger compartment" was "within the . . . immediate control" of those arrested in vehicles, but declared that "it is not true today." *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment).

McLaughlin, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)).

Belton, a decision concerned *exclusively* with the propriety of searching "the interior of an automobile" incident to the arrest of a recent occupant, was simply an effort to provide a "workable definition" of *Chimel*'s "'area within the immediate control of the arrestee'" in that special, limited context. *Belton*, 453 U.S. at 460. Because the only safe and reasonable law enforcement practice is to remove and restrain arrestees who are occupants of vehicles, it is clear that *Belton*'s definition of *Chimel*'s scope *in vehicular contexts* is not supported by the rationales on which *Chimel* is based.

Nor should *Belton* authority be sustained on the ground that a holding that searches incident to arrest are unjustified when arrestees have no access to vehicles might prompt law enforcement officers to modify current practices by allowing arrestees to remain unrestrained either inside or within easy reach of their vehicles. As Justice Scalia explained in *Thornton*, if "'sensible police procedures' require that suspects be" restrained, "then police should" restrain them, "and not conduct [a] search." *Thornton*, 541 U.S. at 627 (Scalia, J., concurring in the judgment).

Not only does this approach strike the proper balance, it finds potent support in the Framers' undeniable hostility to unregulated official discretion to search. Once officers decide to take a vehicle occupant into custody, they have not only the constitutional authority, but also the professional obligation to control the arrestee, preventing him

from endangering the lives of officers and members of the public or destroying evidence of crime.[13] A decision to leave an unrestrained arrestee in or near a vehicle would inevitably *increase* these perils and is entirely inconsistent with the harm-prevention rationales for search incident authority.[14]

To maintain *Belton* authority because officers could leave or have left an arrestee unrestrained would be to sanction intolerable bootstrapping. Officers could generate unnecessary, easily preventable risks, then rely on those risks to justify otherwise unreasonable searches.[15] The Court

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[13] The inherent dangers posed by vehicle occupants entitle officers to control drivers and passengers who are *not* subject to custodial arrest. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Maryland v. Wilson*, 519 U.S. 408 (1997). The greater threats posed by arrestees is surely the reason why the prevailing practice is to control occupants and put them beyond reach of vehicles. An unjustified failure to exert control could also give rise to civil liability for harms caused by an arrestee. For all these reasons, restraint is the responsible choice, the only option that an officer truly concerned with public safety, with evidence preservation, and with avoiding liability, would ordinarily entertain.

[14] It is sometimes suggested that officers may need to search vehicles and other spaces surrounding arrestees to prevent them from "lunging" into those areas for weapons or evidence. *See Thornton*, 541 U.S. at 621. If an officer exerts control, it seems unlikely that an arrestee would be able to lunge successfully. Moreover, diverting attention from an unrestrained arrestee in order to search a vehicle could only increase the odds of such a precipitous move.

[15] Indeed, if the Court were to validate this choice, officers could decide to pause while exiting homes, leaving uncontrolled arrestees within reach of private spaces in order to gain

should foreclose this option, denying authority to search passenger compartments incident to arrests of occupants and thereby eliminating any incentive for unsafe arrest practices.[16] By restricting search incident authority, the Court will promote safe practices consistent with the central objectives of the

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authority to search those now accessible areas. *Chimel's* exigency-based rationale allows officers to remove items at the moment of arrest. 395 U.S. at 763. Officers should be expected to control individuals in custody, preventing access to additional areas that could pose perils. They should not be allowed to conduct otherwise unjustified searches based on threats gratuitously created.

[16] The rejection of this sort of "pretextual" search is not inconsistent with *Whren v. United States*, 517 U.S. 806 (1996). *Whren* holds that when an officer has *probable cause* to seize or search, her actual motives are irrelevant. *Id.* at 811-12. The question here is whether an officer may engage in an objectively unreasonable arrest practice because she subjectively wishes to conduct a search she *cannot* justify by probable cause. There is precedent for denying officers the authority to evade Fourth Amendment commands. *See Georgia v. Randolph*, 547 U.S. 103, 121 (2006) (officers may not remove arrestee because they wish to avoid objection to another's consent to search a jointly-occupied home); *see also Maryland v. Buie*, 494 U.S. 325, 335-36 (1990) (officers must complete arrest and leave home, not delay departure in the hope that a reasonable suspicion of danger will arise and justify a home sweep). Similarly, courts condemn warrantless searches when officers create exigencies to avoid the warrant requirement. *See, e.g., United States v. Coles*, 437 F.3d 361, 362 (3d Cir. 2006); *United States v. Chambers*, 395 F.3d 563, 566 (6th Cir. 2005); *United States v. Duchi*, 906 F.2d 1278, 1284-85 (8th Cir. 1990).

search incident to arrest doctrine. *See Thornton*, 541 U.S. at 627 (Scalia, J., concurring in the judgment).[17]

Search incident to arrest authority rests on a presumed *need* to take swift, preventative action to counter the risks posed by every arrestee. When the need to search does not exist—and it clearly does not when vehicle occupants are arrested and restrained as they should be—officers have no right, entitlement, or constitutional authority to invade privacy. The notion that "one way or another, the search [of a vehicle] must take place," *id.* at 627 (Scalia, J., concurring in the judgment), may be understandable from a law enforcement perspective. From a Fourth Amendment vantage point, however, it is an indefensible outgrowth of *Belton*'s erroneous recognition of authority to search vehicles incident to arrests of recent occupants. It is time to correct the misconceptions and end the abuses resulting from that constitutional misstep.

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[17] An officer might choose to leave an arrestee unrestrained and near a vehicle not because he wishes to conduct a search, but because he does not fear the arrestee. Although he should be free to exercise that discretion, it would be irrational to allow the officer to search a vehicle based on dangers he has deemed negligible or nonexistent. In the exceedingly unlikely case involving a demonstrable reason to leave a potentially dangerous arrested occupant unrestrained and within immediate reach of a vehicle, *Chimel*'s rationales would permit a search.

II. AN INTEREST IN GATHERING EVIDENCE CANNOT JUSTIFY VEHICLE SEARCHES INCIDENT TO ARRESTS OF OCCUPANTS FOR OFFENSES THAT INVOLVE NO EVIDENCE

In *Thornton*, Justice Scalia suggested that there *might* be an "honest" alternative justification for *Belton* searches—the interest in gathering evidence of the crime that is the subject of the arrest. 541 U.S. at 629 (Scalia, J., concurring in the judgment). Even the most cursory examination of the interests involved confirms the validity of his conclusion that evidence gathering cannot support a passenger compartment search after an arrest for an offense whose nature provides "no reasonable basis to believe that relevant evidence might be found in the car." *Id.* at 632.[18]

A. Explorations Of Passenger Compartment Contents Are Serious Intrusions Upon Significant Privacy Interests

"[T]here is 'no ready test for determining reasonableness other than by balancing the need to search . . . against the invasion which the search . . . entails.'" *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)). On one side of the balance is the harm done to privacy. Searches of vehicles incident to arrests effect substantial privacy deprivations.

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[18] These offenses are referred to here as "nonevidentiary," while offenses that might involve evidence are called "evidentiary."

Moreover, because of officers' extensive authority to arrest vehicle occupants, the *aggregate* threat to privacy is enormous.

Under rulings since *Belton*, officers may constitutionally arrest drivers (or passengers) for any offense committed in their presence, no matter how minor, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), even if state law permits no arrest. *See Virginia v. Moore*, 128 S.Ct. 1598 (2008). Because they may arrest for any vehicle code infraction, officers can surely identify objectively valid bases for arresting many, perhaps most, motorists. Many exceed the posted speed limit, and those who do not might well commit another violation. Moreover, even irrefutable proof that an officer had no real interest in the minor offense but desired to conduct an exploratory search incident to the arrest will not render the arrest unreasonable. *Whren v. United States*, 517 U.S. 806, 813 (1996). Thus, officers have incredibly broad authority to arrest individuals for relatively insignificant infractions. The cumulative threat to privacy interests from searches incident to arrests for minor, nonevidentiary offenses is extensive.[19]

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[19] In addition, officers can evade the prohibition on searches incident to traffic citations. *See Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (holding that officers do not have authority to conduct searches incident to traffic citations). If an officer announced that a traffic offender was under arrest, conducted a search, found nothing, then "decided" to be lenient and merely issue a citation, his conduct would appear consistent with *Whren*'s interpretation of the Fourth Amendment. This option

Equally, if not more, important is the *nature* of the damage to privacy interests occasioned by passenger compartment searches. Vehicles are "effects," clearly entitled to Fourth Amendment shelter. The fact that vehicular privacy interests are less weighty than those in homes and other locations, *see United States v. Chadwick,* 433 U.S. 1, 12-15 (1977), does *not* mean that those interests are insignificant. The significance of those privacy interests is demonstrated by the fact that the showing ordinarily needed to breach the privacy of vehicle contents is the identical showing needed to secure a search warrant for a home. *See United States v. Ross,* 456 U.S. 798, 809 (1982) ("a [vehicle] search is not unreasonable if based on facts that would justify the issuance of a warrant").[20] The Court has "always" viewed the privacy interests in passenger compartments as "substantial" enough to trigger the "probable cause" demand. *United States v. Ortiz,* 422 U.S. 891, 896 (1975). This unflinching insistence on probable cause reflects a judgment that passenger compartment searches are serious infringements upon Fourth Amendment values. Moreover, the deprivations are not limited to the

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increases the aggregate jeopardy to privacy from vehicle searches incident to arrests of occupants.

[20] In recognition of the intensely private nature of items placed within personal belongings *not* located in vehicles, officers must obtain warrants before searching those belongings. *See United States v. Chadwick,* 433 U.S. 1 (1977). For historical and practical reasons, warrant protection is suspended when a container enters a vehicle. *See California v. Acevedo,* 500 U.S. 565, 574-76 (1982).

vehicles and containers of arrestees. Currently, privacy interests in vehicles and containers belonging to individuals who have committed no offense whatsoever are in jeopardy following any recent occupant's arrest.[21]

In sum, because officers possess broad powers to arrest vehicle occupants and because privacy interests of arrestees and innocent third parties in vehicle contents are weighty, the privacy invasions resulting from the exploratory searches permitted by *Belton* are severe.[22]

B. Explorations Of Passenger Compartment Contents Incident To Arrests Of Occupants For Nonevidentiary Offenses Further No Cognizable Government Interests

The other side of the Fourth Amendment balance analyzes "the degree to which [an intrusion]

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[21] Like the automobile exception, *see Wyoming v. Houghton*, 526 U.S. 295 (1999), there can be no doubt that the *Belton* doctrine extends to all containers, not just those belonging to arrestees.

[22] As in Gant's case, officers *do* exercise their authority to arrest for minor, nonevidentiary offense and *do* conduct searches of vehicles incident to those arrests. *See, e.g., United States v. Reavill*, No. 8:07CR62, 2007 WL 1557135, at*1 (D. Neb. May 24, 2007); *United States v. Tillman*, No. CR. 06-31-KKC, 2006 WL 3780557, at *3 (E.D. Ky. Dec. 20, 2006); *United States v. Southerland*, No. 03-216 (RBW), 2005 WL 5748476, at *1 (D.D.C. Apr. 20, 2005). Thus, in this situation, there is no "dearth of horribles demanding redress." *Atwater*, 532 U.S. at 321. Constitutionally protected privacy interests are, in fact, at risk.

is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton,* 526 U.S. 295, 300 (1999). Searches following arrests for nonevidentiary offenses are fishing expeditions, wholly unnecessary to promote *legitimate* interests. By itself, an arrest for a nonevidentiary offense furnishes *no* basis to believe that a passenger compartment search will actually yield evidence. The character of the offense—speeding or driving with a suspended license, for example—generates absolutely no likelihood that evidence will be found in the area the arrestee occupied. *See Knowles v. Iowa,* 525 U.S. 113, 118 (1998) (speeding is not an offense for which evidence would be found). A mere arrest for this sort of offense furnishes no counterbalance for the *certain* damage to privacy. When an arrestee has no access to a vehicle and when her alleged offense provides no reason at all to suspect that evidence might be present, there is no weight on the government's side of the Fourth Amendment scales. Because the constitutional balance tips so decidedly in favor of the individual, any search is unreasonable.

In sum, the search of Gant's car cannot be justified by the officer safety or evidence preservation rationales that underlie the *Chimel* doctrine because the officers did what they should do upon arresting a vehicle occupant, they deprived him of access. Because Gant's arrest was for driving with a suspended license, an interest in gathering evidence cannot justify the search of his car. For these reasons, the Court should affirm the decision of the Arizona Supreme Court.

III. THE COURT SHOULD NOT ADDRESS THE CONSTITUTIONALITY OF SEARCHING A VEHICLE FOLLOWING THE ARREST OF AN OCCUPANT FOR AN OFFENSE THAT MIGHT INVOLVE EVIDENCE

Gant was arrested for driving with a suspended license, an offense that engendered *no* prospect that evidence would be found nearby.[23] Consequently, the Court can resolve this case on the sole ground that officers may not search a vehicle merely because an occupant has been arrested for a nonevidentiary offense. The Court need not address the reasonableness of a vehicle search after an arrest for an offense that might involve evidence. Resolution of that issue should await a future case involving an arrest for an evidentiary offense—a case in which the issue has been briefed and argued by the parties.

This Court does not customarily issue advisory opinions. *See Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S. Ct. 2411, 2419 (2007). Its ordinary practice is to apply the law to the facts of the particular case before it and to avoid dicta. *See Ferguson v. City of Charleston*, 532 U.S. 67, 85 n.24 (2001); *Local 144 Nursing Home Pension Fund v.*

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[23] Under Arizona law, this offense is a misdemeanor consisting of the following elements: "(1) driving a motor vehicle; (2) on a public highway in this state; (3) when the privilege to drive has been suspended." *State v. Brown*, 986 P.2d 239, 241 (Ariz. Ct. App. 1999); *see also* Ariz. Rev. Stat. § 28-3473 (2008). Evidence of this offense will not be found in a vehicle following an arrest. In its merits brief, Arizona makes no argument to the contrary.

Demisay, 508 U.S. 581, 592 n.5 (1993); *United States v. U.S. Gypsum Co.*, U.S. 364, 411 (1948) (Frankfurter, J., concurring). Deciding an issue only after it had been "fully aired" by the parties, *Clay v. United States*, 537 U.S. 522, 526 n.2 (2003), and avoiding unnecessary pronouncements honors the "virtue" of "judicial restraint." *Demisay*, 508 U.S. at 592 n.5. Moreover, addressing a significant constitutional question only after thorough briefing and argument by the parties guarantees that the Court has "investigated [it] with care, and considered [it] in its full extent." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-40 (1821) (Marshall, C.J.); *see also* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1021-22 (2005).

This case does not afford the best opportunity for the Court to consider the immediate and long-term ramifications of automatic vehicle searches based on arrests of occupants for evidentiary offenses. Endorsement or rejection of an alternative, evidence-gathering rationale as the foundation for sustaining some searches permitted today under *Belton* will have significant implications for law enforcement and for Fourth Amendment rights. Neither the facts of this case nor the lower court proceedings alerted the parties of a need to explore the many facets of this issue. The Court, therefore, should allow the question to percolate further in the lower courts and should resolve it only after it is squarely presented and fully explored in a future case.

IV. AN INTEREST IN GATHERING EVIDENCE DOES NOT FURNISH A CONSTITUTIONALLY ADEQUATE JUSTIFICATION FOR VEHICLE SEARCHES INCIDENT TO ARRESTS OF OCCUPANTS FOR OFFENSES THAT MIGHT INVOLVE EVIDENCE

In *Thornton,* Justice Scalia suggested that it might be rational to preserve *Belton* authority when the *nature* of an arrested occupant's offense renders it "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton,* 541 U.S. at 632 (Scalia, J., concurring in the judgment). In his view, a *Belton* search *could* be reasonable "simply because the car *might* contain evidence relevant to the crime for which [an occupant] was arrested." *Id.* at 628 (emphasis added).[24] In fact, every relevant consideration militates strongly against the recognition of "evidence-gathering" authority based *solely* on the character of an offense.

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[24] It is not *entirely* clear that Justice Scalia meant to suggest that the nature of the offense *alone* might justify a *Belton* search. He may have meant merely that the nature of the offense is a relevant factor. The foundation for his suggestion, *United States v. Rabinowitz,* 339 U.S. 56 (1950), involved specific facts beyond the arrest that made it likely that a search would yield evidence. The officers not only had "probable cause to believe" that the arrestee was conducting an illegal business, but also had "most reliable information" that the items they sought were in his possession and "concealed . . . in the very room where he was arrested." *Id.* at 62-63.

A. The Fourth Amendment's Text, History, And Precedents Demand That An Evidence-Gathering Search Be Supported By Probable Cause To Search

The Fourth Amendment provides a right against "unreasonable searches and seizures" and specifies a substantive reasonableness norm—"probable cause." The Framers constitutionalized the probable cause standard in direct response to the general warrants and writs of assistance that were anathema to the colonists and a primary cause of the American Revolution. *See Virginia v. Moore*, 128 S.Ct. 1598, 1603 (2008); James J. Tomkovicz, *California v. Acevedo*: *The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1130-31 (1992).[25] Their intent was to outlaw these tools of tyranny by declaring that a bare suspicion or a mere possibility is insufficient to render a search reasonable. *See* Tomkovicz, *supra*, at 1130-31. Privacy should be forfeit *only* when the government establishes a more substantial likelihood that

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[25] Although the "probable cause" demand is found in the Warrant Clause, the Court has long held that it is a norm of reasonableness for warrantless investigative searches. *See Wong Sun v. United States*, 371 U.S. 471, 479-80 (1963). It would be incongruous and inconsistent with the history of the Fourth Amendment to permit officers to search for evidence on grounds that could not justify a magistrate's issuance of a warrant.

legitimate interests will be served.[26] Probable cause, therefore, is "the textual and traditional standard," *Arizona v. Hicks,* 480 U.S. 321, 329 (1987), prescribed by the Framers to strike the delicate balance between freedom and order. *See Dunaway v. New York,* 442 U.S. 200, 213-15 (1979).

Moreover, probable cause is the presumptive norm for *all* searches. Neither the Fourth Amendment's text nor its history distinguishes between searches of homes, persons, or effects—including vehicles. Consequently, "the Court *always* has regarded probable cause as the minimum requirement for a lawful search" of an automobile. *United States v. Ortiz* 422 U.S. 891, 896 (1975) (emphasis added). In *Carroll v. United States,* 267 U.S. 132 (1925), the first opinion to recognize a warrant rule exception for movable vehicles, the Court "emphasized the importance of the requirement that officers have probable cause to believe that the vehicle contains" objects the government is entitled to seize. *United States v. Ross,* 456 U.S. 798, 807-08 (1982). The identical emphasis upon the centrality of probable cause permeates the Court's most recent discussion of the automobile doctrine in *Wyoming v. Houghton,* 526 U.S. 295, 300-02, 307 (1999). And while the Court has struggled in a long line of intervening cases to define the scope of that doctrine, it has insisted throughout that a particularized showing of probable

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[26] The Court has held that a "fair probability" or a "substantial chance" is sufficient. *See Illinois v. Gates,* 462 U.S. 213, 238, 243 n.13 (1983).

cause is the essential precondition for a warrantless search for evidence. *See, e.g., California v. Acevedo,* 500 U.S. 565, 579 (1991); *California v. Carney,* 471 U.S. 386, 392 (1985); *Ross,* 456 U.S. at 807-08 n.9; *Texas v. White,* 423 U.S. 67, 68 (1975); *Chambers v. Maroney,* 399 U.S. 42, 51-52 (1970). For over eighty years, this Court has "read the historical evidence to show that the Framers would have regarded" the warrantless search of a vehicle and its contents "as reasonable (*if there was probable cause*)." *Houghton,* 526 U.S. at 300 (emphasis added).

B. The Balance Of Interests Does Not Justify A Passenger Compartment Search Based Solely On The Arrest Of An Occupant For An Offense That Might Involve Evidence

The balance struck by the Framers requires the government to establish probable cause, a showing *not* satisfied by the mere fact of an occupant's arrest for an offense that *might* involve evidence. Moreover, an arrest for such an offense does *not* alter the constitutional balance in any way that could justify departure from the probable cause requirement.

1. A Lawful Arrest Alone Does Not Automatically Establish A Fair Probability That Evidence Will Be Found In The Vicinity Of The Arrestee

Probable cause *to arrest* exists if there is a fair probability that the individual has committed or is committing an offense. *See Brinegar v. United States,* 338 U.S. 160, 175-76 (1949). Probable cause

to search requires a specific showing of a fair probability that fruits, instrumentalities, contraband, or evidence will be found in the place to be searched. *See United States v. Grubbs*, 547 U.S. 90, 95 (2006). Facts that support the arrest of a vehicle occupant will sometimes also establish probable cause to search the vehicle. An arrest for an evidentiary offense may be a significant factor in the totality. There are situations, however, in which there is a fair probability that an occupant has committed an offense, but a vehicle search cannot be justified. The offense may have been committed long before the arrest or at a distant location, or the arrestee may be a mere passenger with a limited connection to the vehicle or the possessions inside. The myriad possibilities belie any claim that an arrest alone always or generally furnishes the "fair probability" required for a search. *See* Tomkovicz, *supra* note 3, at 1469.

In sum, although officers have grounds to believe that an "evidentiary" offense has been committed, the *possibility* that evidence *might* be nearby does not satisfy the "textual and traditional" probable cause demand.

2. The Arrest Of An Occupant For An Evidentiary Offense Does Not Diminish The Severity Of The Privacy Deprivation

In a limited number of narrowly-defined situations involving intrusions on privacy that are markedly less severe, the Court has suspended the probable cause demand. *See Dunaway*, 442 U.S. at

208-12.[27] The arrest of an occupant for an evidentiary offense does not diminish the intrusiveness of a vehicle search.

The Court has cited the "reduced" privacy expectations in vehicles as a basis for an exception to the warrant rule. *See Carney*, 471 U.S. at 391-393. While doing so, the Court has stressed the need for probable cause *because* a "search, even of an automobile, is a *substantial* invasion of privacy." *Ortiz*, 422 U.S. at 896 (emphasis added). *Belton* searches invade not only substantial vehicular privacy interests, but even weightier privacy interests in personal containers belonging to arrestees and others. The arrest of an occupant does not lessen the severity of these intrusions. An occupant's interests in the liberty and privacy of his person are distinct from and independent of privacy interests in the contents of the vehicle. Nothing in the text or history of the Fourth Amendment or this Court's precedents suggests that an arrest somehow reduces the value of the constitutionally sheltered interests in the place surrounding the arrestee.[28]

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[27] The fact a privacy intrusion is less severe is a necessary, but not sufficient, basis for diluting the constitutional norm. A heightened government interest is also needed.

[28] A lawful, probable-cause based arrest certainly does "distinguish the arrestee from society at large." *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment). The arrestee will suffer justified losses of liberty and of the privacy of his person and the belongings he carries. An arrest, however, provides no basis for devaluing privacy interests in other places associated with the arrestee. *Cf. Belton*, 453 U.S. at 460-61 (1981); *Chimel*, 395 U.S. 752, 766 n.12 (1969).

The notion that a justified deprivation of one Fourth Amendment interest diminishes the worth of separate and distinct Fourth Amendment interests is corrosive and inconsistent with the spirit of that guarantee. *See* Tomkovicz, *supra,* note 3, at 1462 n.260.

A search may also be substantially less intrusive because of its narrow scope. *See, e.g., Terry v. Ohio,* 392 U.S. 1, 26, 29-30 (1968); *Maryland v. Buie,* 494 U.S. 325, 327, 335-36 (1990). An evidence-gathering rationale may not afford officers unbounded authority to rummage endlessly for anything they might find. *See Thornton,* 541 U.S. at 630 (Scalia, J., concurring in the judgment). Still, the scope of searches for evidence following arrests will be anything but *narrow.* The proposed alternative rationale for *Belton* searches will typically afford officers the power to explore vehicle contents thoroughly, permitting even broader searches than those currently taking place.[29] In a rare case, the arrest might support only a limited search for a discrete item. Ordinarily, however, because officers will be in quest of an indefinite amount of evidence or contraband that could be concealed anywhere, there will be no meaningful

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[29] Currently, *Belton* searches have temporal and spatial limits that would not follow from an evidence-gathering rationale. Taken at face value, there would seem to be no need for recent occupancy by the arrestee or for contemporaneity of the search, and trunk searches would seem to be justified by an evidence-gathering rationale.

temporal or spatial constraints upon their privacy invasions.

More to the point, the Court has *never* suggested, because it would be inconsistent with the constitutional text and history, that a vehicle search for a single item of evidence or a determinate quantity of contraband is less intrusive and, therefore, reasonable on less than probable cause.[30] The absence of authority to rummage at will is scarcely a basis for concluding that a substantial privacy invasion is exempt from the probable cause requirement. That constitutional norm governs both limited and unlimited investigative searches. If the contrary view were accepted, "the protections intended by the Framers could all too easily disappear." *Dunaway*, 442 U.S. at 213.

Because evidence-gathering searches of vehicles effect serious and substantial invasions of privacy, the probable cause norm may not be suspended.

3. An Evidence-Gathering Search Of Vehicle Contents Following The Arrest Of An Occupant For An Evidentiary Offense Furthers No Heightened Or Uniquely Weighty Interests

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[30] To the contrary, *Acevedo*, 500 U.S. 565 in which officers had probable cause to believe that contraband was located *only* in a paper bag in the trunk of a car, and, therefore, could not search the car itself, confirms that even when officers are not authorized to rummage for anything they might find, a vehicle search is sufficiently intrusive to demand probable cause. *Id.* at 572-75.

Even when privacy intrusions are sufficiently less severe, there is another essential ingredient before the Court may balance interests. A search must serve an interest weightier than the ordinary interest in gathering evidence of crime. According to Justice Scalia, "heightened law enforcement needs" might render *Belton* searches of vehicles reasonable following arrests for evidentiary offenses. *Thornton*, 541 U.S. at 631 (Scalia, J., concurring in the judgment). In fact, the societal interests implicated are not of a sort that can justify dilution of the Fourth Amendment norm.

In criminal investigation contexts,[31] the Court has authorized limited searches of persons, areas, and even homes on less than probable cause *only* when the compelling interest in officer safety has been at stake. *Terry* approved a limited pat down for weapons based upon a reasonable suspicion *only* because of the threat to officers' lives. *Michigan v. Long*, 463 U.S. 1032 (1983), endorsed a restricted passenger compartment search, but *only* if based on a reasonable suspicion that dangerous weapons are present and *only* because those weapons could endanger officers during investigative detentions. And *Buie* permitted a confined *protective* sweep of a home based on an articulable showing that a safety

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[31] The Court has allowed less intrusive searches on less than probable cause to serve "special" interests outside criminal investigation contexts. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (searches of students by school officials). Because an evidence-gathering search after an arrest serves no special interests, standards governing investigative searches apply.

threat exists and *only* because of the unique perils to officers' lives posed by in-home arrests.

In contrast, the Court has *never* allowed law enforcement to search for evidence or contraband on less than probable cause. *Minnesota v. Dickerson*, 508 U.S. 366 (1993), deemed unreasonable the arguably modest privacy invasion effected by brief manipulation of a lump in a suspect's pocket because it was "the sort of *evidentiary* search" on less than probable cause that the Court has consistently "condemned." *Id.* at 378 (emphasis added). Even with the significant interest in interdicting easily concealed contraband in the balance, the Court remained true to the Framers' vision and refused to authorize any privacy invasion—*i.e.*, a *search*—on a mere reasonable suspicion.[32]

The "heightened law enforcement needs," *Thornton*, 541 U.S. at 631 (Scalia, J., concurring in the judgment), generated by the possibility that individuals might employ readily moveable vehicles to further criminal enterprises, have supported a "vehicle exception" to the *warrant requirement*. *See*

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[32] *Arizona v. Hicks*, 480 U.S. 321 (1987), provides additional support. There, the relatively minor intrusion on privacy effected by revealing "nothing but the bottom of a turntable" was deemed unjustifiable on anything less than "probable cause" to believe that evidence of larceny would be found. *Id* at 325. *Dickerson* and *Hicks* establish that a less severe intrusion on privacy interests is not, by itself, sufficient reason to suspend the probable cause norm. *United States v. Place*, 462 U.S. 696 (1983), which authorized only a brief *seizure* of publicly-situated luggage based on a reasonable suspicion of contraband, is not to the contrary. No search was involved.

Wyoming v. Houghton, 526 U.S. 295, 303 (1999). Never has the Court so much as hinted that the need for swift action could justify dilution of the Fourth Amendment's substantive norm. Instead, while acknowledging that mobility creates a need to act, the Court has demanded the same showing necessary to secure a warrant—probable cause. *See id.* at 300-03 (emphasizing the longstanding, historical need for probable cause to search a vehicle).

Thus, the other critical predicate for a lower-than-normal Fourth Amendment standard is lacking. The government's interests are typical, not uniquely weighty. Interest balancing dictates the same answer that history, the constitutional text, and the precedents mandate. An intrusive vehicle search cannot be sustained simply because evidence *might* be found there after an occupant's arrest. Only probable cause to search can suffice.

The contention that *Belton* searches following evidentiary offense arrests can be justified by an "evidence-gathering" rationale is rooted entirely in *Rabinowitz*,[33] a discredited decision which was *unanimously* repudiated in *Chimel* because it distorted Fourth Amendment principles. The *Chimel* majority declared that the arguments undergirding *Rabinowitz* were "founded on *little more than a subjective view* regarding the acceptability of certain sorts of police conduct, and not on considerations

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[33] *See Thornton*, 541 U.S. at 629 (Scalia, J., concurring in judgment).

relevant to Fourth Amendment interests." *Chimel*, 395 U.S. at 764-65 (emphasis added). Justice Harlan explained that he felt compelled to abandon *Rabinowitz* because he could not "in good conscience vote to perpetuate *bad Fourth Amendment law*." *Id.* at 769 (Harlan, J., concurring) (emphasis added). Because these devastating critiques of *Rabinowitz* are as persuasive today as they were forty years ago, the Court should not revive its doctrine.

As Justice Frankfurter observed in *Rabinowitz*, "[t]o say that [a] search must be reasonable is to require some criterion of reason." *Rabinowitz*, 339 U.S. at 83 (Frankfurter, J., dissenting). The proper criteria surely are "the history and experience which [the Fourth Amendment] embodies and the safeguards afforded by it against the evils to which it was a response." *Id.* The Framers envisioned the probable cause command as a critical shield against those evils. With all due respect, the unsupported assertion that "[t]here is nothing irrational about broad police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested," *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment), is an inadequate basis for diluting Fourth Amendment protection. Evidentiary searches of vehicles are constitutional *only* "upon probable cause."

C. Law Enforcement Will Retain Adequate Authority To Serve Legitimate Interests In Finding Evidence In Vehicles

The costs of forbidding the exploratory rummaging permitted and promoted by *Belton* are no reason to refrain from taking that constitutionally necessary step. The Framers decided that the privacy and liberty protections afforded by the probable cause requirement justified its impact on law enforcement.

It bears mention, nonetheless, that the price of reaffirming this core Fourth Amendment principle will not be excessive. Officers will still possess ample authority to search vehicles for evidence. First, the "automobile exception" allows warrantless searches whenever probable cause to search exists. In some, perhaps many, situations involving lawful arrests for evidentiary offenses, the totality will also establish a "fair probability" that evidence will be found. Moreover, in a substantial number of other cases, officers will have authority to impound and inventory a vehicle following an arrest. *See, e.g., Colorado v. Bertine*, 479 U.S. 367 (1987). When neither of those options is available, officers may seek consent from anyone with authority. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *United States v. Matlock*, 415 U.S. 164 (1974).[34]

Over sixty years ago, in objecting to indefensibly broad authority to search places incident to arrests, Justice Jackson noted that the

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[34] When individuals lack authority, searches will still be reasonable if officers reasonably believe they have authority to consent. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990). These grounds may also justify vehicle searches following arrests for nonevidentiary offenses.

Fourth Amendment embodied the Framers' fundamental commitment to privacy and that he was not "disposed to set their command at naught," even if he believed that they had placed too high a value on privacy. *Harris v. United States*, 331 U.S. 145, 198 (1947)(Jackson, J., dissenting). This Court should similarly affirm the Framers' balance by holding that the arrest of a vehicle occupant does not entitle police officers to search passenger compartment contents.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-542

In the
Supreme Court of the United States
October Term, 2007

STATE OF ARIZONA,
Petitioner,

vs.

RODNEY JOSEPH GANT,
Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

MOTION TO FILE BRIEF and BRIEF AMICI CURIAE of AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, THE NATIONAL SHERIFFS' ASSOCIATION, THE ARIZONA LAW ENFORCEMENT LEGAL ADVISORS' ASSOCIATION and THE ARIZONA ASSOCIATION OF CHIEFS OF POLICE, IN SUPPORT OF PETITIONER.

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ON WRIT OF CERTIORARI TO THE
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MOTION TO FILE BRIEF and BRIEF AMICI CURIAE of AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, THE NATIONAL SHERIFFS' ASSOCIATION, THE ARIZONA LAW ENFORCEMENT LEGAL ADVISORS' ASSOCIATION and THE ARIZONA ASSOCIATION OF CHIEFS OF POLICE, IN SUPPORT OF PETITIONER.

MOTION OF *AMICI CURIAE* TO FILE BRIEF AND BRIEF *AMICI CURIAE* [1]

This motion and brief is filed pursuant to Rule 37 of the United States Supreme Court. Timely notice of intent to file this brief has been served upon Counsel for each party. Consent to file has been granted by Counsel for the Petitioner. Consent to file has been withheld by the Respondent, making this motion necessary under Rule 37.3(b). The letter of consent of the Petitioner has been filed with the Clerk of this Court, as required by the Rules. The letter of Respondent withholding consent has also been filed with the Clerk.

Americans for Effective Law Enforcement, Inc., the International Association

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This motion and brief were authored for the *amici* by James P. Manak, Esq., Counsel of Record, Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc., Michael E. McNeff, Esq., Arizona Law Enforcement Legal Advisors' Association and Eric B. Edwards, Esq., Arizona Association of Chiefs of Police. No other persons authored this motion and brief. Americans for Effective Law Enforcement, Inc. made the complete monetary contribution to the preparation and submission of this motion and brief, without financial support from any source, directly or indirectly.

of Chiefs of Police, The National Sheriffs' Association, The Arizona Law Enforcement Legal Advisors' Association and The Arizona Association of Chiefs of Police move this Court for leave to file the attached brief as *amici curiae*, and declare as follows:

1. *Identity and Interest of Amici Curiae*. The *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), was founded in

1893 and is the largest organization of police executives and line officers in the world. IACP's mission, throughout the history of the association, has been to identify, address and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America. It conducts programs of training, publications and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The Arizona Law Enforcement Legal Advisors' Association (ALELAA) is an association of attorneys who advise and represent local, state and federal law enforcement agencies. The Arizona Association of Chiefs of Police (AACP) is an association of all of the municipal chiefs of police in Arizona. Both organizations have a keen interest in any legislation, court decision or statement of public policy that affects the authority, effectiveness, safety and welfare of law enforcement officers in the State of Arizona. The members of the ALELAA also

provide a large portion of basic and advanced legal training to Arizona law enforcement officers. The decision of the court below has an adverse effect on the effectiveness and safety of law enforcement officers in Arizona as well as other states. These organizations seek to assist this Court by providing their analysis of the issues and a broader look at the risk to police officers presented by the decision in this case.

2. *Desirability of an Amici Curiae Brief.* *Amici* are national and state associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of formulating rules and policies on arrests and searches of vehicles and the safety of police officers in conducting their sworn duties; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of training and policies on the subject.

Because of the relationship with our members and the composition of our membership and directors, including active law enforcement administrators and

counsel, we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues. Amici* are national and state law enforcement organizations and their perspective is broad. This brief concentrates on policy issues, including the importance of effective rules and procedures for conducting arrests and searches of vehicles and the protection of law enforcement officers from injury and death as they perform their duties. Although the parties clearly are represented by capable and diligent counsel, no single party can completely develop all relevant views of such policy issues as these.

4. *Avoidance of Duplication.* Counsel of Record for *amici curiae*, James P. Manak, Esq., has reviewed the facts of this case and has conferred with Counsel for Petitioner and Counsel for Respondent in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues directly related to law enforcement legal and safety concerns that are not otherwise raised by either party.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received and filed with the Clerk of this Court. This motion is necessary because the Respondent has not granted consent to *amici*.

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

See Section of Identity and Interest of *Amici Curiae*, *supra*.

STATEMENT OF THE CASE

Two uniformed Tucson, Arizona police officers went to a house after receiving a tip of narcotics activity there. When Defendant Rodney Gant answered the door, the officers asked to speak with the owner of the residence. Gant informed the officers that the owner was not home, but would return later that afternoon. After leaving the residence, the officers ran a records check and discovered that Gant had a suspended driver's license and an outstanding warrant for driving with a suspended license. The officers returned to the house later that evening. While they were there, Gant drove up and parked his car in the driveway. Police officers immediately confronted Gant when he drove up and got out of his car. Within minutes, they arrested him, placed him in handcuffs, and locked him in a patrol car; they then promptly searched his car, where they found a pistol and a bag of cocaine. The Arizona Supreme Court, *Arizona v. Gant*, 216 Ariz. 1, 162 P.3d 640 (2007), held that the warrantless search could not be justified as incident to Gant's arrest because, at the time of the search, there were no exigent

concerns for either officer safety or the preservation of evidence.

A dissenting justice, joined by the Chief Justice of the Arizona Supreme Court, took the position that the majority's reasoning and conclusion were inconsistent with *New York v. Belton*, 453 U.S. 454 (1981), in which this Court adopted a "bright line" rule for searches of vehicles incident to the arrest of occupants.

SUMMARY OF ARGUMENT

Amici urge this Court to reverse the decision of the Arizona Supreme Court because a search of a motor vehicle incident to arrest, when the suspect is handcuffed and in the back of a police car, has been upheld by *New York v. Belton* and its progeny. It is reasonable and necessary for officers to do a *Belton* search while an arrestee is handcuffed and in the back of a patrol car because the balancing of the state's interest against the arrestee's privacy interest falls on the side of the government due to the lesser privacy interest afforded motor vehicles and the legitimate and weighty concern for the safety of law enforcement officers. Law enforcement officers in the United States have relied on the authority set forth in *Belton* and subsequent cases for many years and to

remove that authority now would create disarray among the courts and law enforcement agencies that the *Belton* "bright line" rule was designed to eliminate.

ARGUMENT

THIS COURT SHOULD REVERSE THE DECISION BY THE ARIZONA SUPREME COURT BECAUSE A SEARCH OF A MOTOR VEHICLE INCIDENT TO ARREST, WHEN THE ARRESTEE IS HANDCUFFED AND IN THE BACK OF A POLICE CAR, HAS BEEN UPHELD BY *NEW YORK v. BELTON* AND ITS PROGENY; IT IS REASONABLE FOR OFFICERS TO DO A *BELTON* SEARCH WHILE THE ARRESTEE IS HANDCUFFED AND IN THE BACK OF A PATROL CAR BECAUSE THE BALANCING OF THE STATE INTEREST AGAINST THE ARRESTEE'S PRIVACY INTEREST FALLS ON THE SIDE OF THE GOVERNMENT DUE TO THE LESSER PRIVACY INTEREST AFFORDED MOTOR VEHICLES AND THE LEGITIMATE AND WEIGHTY CONCERN FOR THE SAFETY OF LAW ENFORCEMENT OFFICERS.

Amici will not repeat the legal arguments put forward by the Petitioner in this case; we do, however, support them. As national and state representatives of law enforcement officers, administrators and legal advisors, we wish to inform the Court of the following policy considerations from our professional perspective.

The decision of the Arizona Supreme Court misses one of the truly important aspects of *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860 (1981), *i.e.*, that courts should give law enforcement officers standardized rules to follow *where possible and appropriate*. *Amici* are well aware that standardized rules may not be feasible for all Fourth Amendment legal issues with which officers work. The rule for searches of motor vehicles incident to the arrest of recent occupants crafted by *Belton* and its progeny, however, is a reasoned standardized rule and one that has been in place for many years in most jurisdictions. This rule has made officers more *effective and safe* by allowing a fleeting window of authority that minimally impacts the privacy interests of arrested persons.

Since *Belton* was decided, courts have recognized that traffic stops are an inherently dangerous situation for police officers and suspects. *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2137 (2004) (a custodial arrest and incidental search of a vehicle is fluid and the danger to the police officer flows from the fact of the arrest and its attendant proximity, stress, and uncertainty); *Maryland v. Wilson*, 519 U.S. 408, 413, 117 S.Ct. 882 (1997) ("Regrettably, traffic stops may be dangerous encounters . . . the fact that there is more than

one occupant of the vehicle increases the possible sources of harm to the officer."); *Michigan v. Long*, 463 U.S. 1032, 1048, 103 S.Ct. 3469 (1983) (noting ". . . inordinate risk confronting an officer as he approaches a person seated in an automobile."); *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 98 S.Ct. 330 (1977) ("Indeed, it appears that a significant percentage of murders of police officers occurs when the officers are making traffic stops."); *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995) (investigative detentions involving suspects in vehicles are especially fraught with danger to police officers); *United States v. Flores*, 359 F.Supp.2d 871, 876 (D. Ariz. 2005) (". . . dangerous situations can arise if recently stopped persons are allowed to confer out of his [officer's] presence."); *State v. Ochoa*, 189 Ariz. 454, 943 P.2d. 814, 822 (App. Div. 1, 1997) ("Nor does the fact that an investigating officer may have the person 'under his control' diminish the vulnerability of the officer in such situations when the individual still could bolt and retrieve any weapon[s] in the vehicle."); *State v. Webster*, 170 Ariz. 372, 824 P.2d 768, (App.Div. 2, 1991) (the court noted the risks that police officers confront when making traffic stops and agreed that the safety of the police officer is a legitimate and weighty concern).

There have been many cases documenting situations in which suspects who were handcuffed and locked in the back seat of police cars, subsequently escaped. Often these escaping suspects subsequently assaulted the arresting officers. For example, see *State v. Rickman*, 148 Ariz. 499, 715 P.2d 752 (1986) (armed robbery suspect being transported from court opened patrol car door and escaped); *Pakdimountivong v. Arlington*, 219 S.W.3d 401 (Tex. App. 2006) (suspect handcuffed and in leg restraints, smashed window and jumped from moving patrol car); *State v. Walls*, 62 S.W.3d 119 (Tenn. 2001) (suspect double cuffed, secured with a rip-hobble device and locked in back of patrol car, escaped by kicking out rear window while the car was moving with two deputies in front seat); *State v. Shanks*, 139 Idaho 152, 75 P.3d 206 (2003) (suspect handcuffed and put in back of patrol car escapes while deputies complete investigation); *State v. Nab*, 112 Idaho 1139, 739 P.2d 438 (1987) (reckless driving suspect who was handcuffed and locked in patrol car escapes while officer securing suspect's vehicle); *Menard v. State*, 16 Ark. App. 219, 699 S.W.2d 412 (1985) (arrested DWI suspect escaped while trooper doing vehicle inventory, was recaptured, then escaped again from moving patrol car); *State v. Hood*, 24 Wash. App. 155, 600 P.2d 636 (1979) (suspect handcuffed and

in the back of patrol car escaped while deputy interviewing witnesses; after recapture, while handcuffed and in the back of patrol car, suspect attacked deputy while he was driving).

Amici know from experience that the assertion that just because a suspect is handcuffed and in the back of a patrol car he is no longer a threat, is not true. Police officers are trained to always keep watch on a suspect for that exact reason. Prisoners have escaped from maximum security correctional facilities; it is unrealistic to believe they cannot escape from a police car on the street.

Courts should also take into consideration that not all officers have back-up readily available. Every day state police officers, highway patrol officers, deputy sheriffs and other law enforcement officers working in rural areas must deal with similar situations without another officer watching the suspect in custody. These officers risk their lives even when reasonable protective measures are taken.[2]

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[2] Safety is an issue not only for on-the-scene officers, but other officers who may be involved in an inventory of an automobile's contents or other evidence-gathering work. Items such as sharp instruments, needles or firearms pose a safety hazard for on-scene personnel as well as those involved later.

The Arizona Court of Appeals, which was affirmed by the Supreme Court of Arizona, took the position that: "If sensible police procedures require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars and not conduct the search." *State v. Gant*, 213 Ariz. 446, 143 P.3d 379, 386 (Az. App. 2006). This view, affirmed by the Arizona Supreme Court, places police officers in the untenable position of making a choice of practicing officer safety or being effective in carrying out their law enforcement duties. The dissenting opinion in the Court of Appeals stated:

> There is, however, a practical and unfortunate effect of today's decision that will encourage police to search an arrestee's immediate area or vehicle without delay and before he or she is safely secured, precisely the real-world danger that *Belton* and its progeny have sought to ameliorate while balancing the requirements of the Fourth Amendment. *State v. Gant*, 213 Ariz. 446, 143 P.3d 379, 387 (Az. App. 2006).

This is exactly the concern that *Amici* have. Officers rely on the courts to give

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Officer safety always remains an important issue in the arrest of suspects.

them the legal tools to be effective in seizing evidence and contraband and at the same time to practice officer safety. The "bright line" rule set forth in *Belton* and its progeny is one of the most effective tools ever provided by the courts.

Having stated the government's interest in maintaining the effectiveness and safety of law enforcement officers, the other side of the consideration is the privacy interest of the suspect. There is, of course, an expectation of privacy in the interior and contents of a motor vehicle. This interest, however, is a reduced expectation stemming from pervasive regulation of vehicles traveling on highways. *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066 (1985). The reduced expectation of privacy also exists due to the mobility of motor vehicles because they can be "quickly moved." *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280 (1925). In some cases, the configuration of the vehicle has contributed to the lower expectation of privacy.

For example, in *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464 (1974), it was held that, because the passenger compartment of a standard automobile is relatively open to plain view, there is a lesser expectation of privacy. But even

when enclosed "repository" areas have been involved, this Court has concluded that the lesser expectation of privacy warrants application of the automobile exception to the warrant requirement. It has applied the exception in the context of a locked trunk, *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523 (1973), a sealed package in a car trunk, *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, (1982), a closed compartment under the dashboard, *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975 (1970), the interior of a vehicle's upholstery, *Carroll*, *supra*, and sealed packages inside a covered pickup truck, *United States v. Johns*, 469 U.S. 478, 105 S.Ct. 881 (1985).

All of these cases dealt with probable cause situations, where if there had been time, a warrant could have been issued. But there are other cases authorizing warrantless searches, or limited intrusions, with only reasonable suspicion, such as a "frisk" of a vehicle for weapons, *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1983), and a search for vehicle registration when there is reasonable suspicion the vehicle may be stolen, *State v. Taras*, 19 Ariz. App. 7, 504 P.2d 548 (Az. App. 1972). The search of a motor vehicle incident to arrest of an occupant or recent occupant falls in between these two concepts, making the

lesser expectation of privacy apply in this case. *Amici* submit that the lesser expectation of privacy in a motor vehicle must fall to the more weighty concern for the effectiveness and safety of law enforcement officers.

The *Belton* decision and its progeny are many years old. Law enforcement officers throughout the country have relied upon these decisions for decades. They have been trained that this is the correct way to balance the need for effective law enforcement and officer safety. There have been no reports of mass violations of civil rights. There has been no hue and cry from the public concerning this procedure. One can only assume that this is so because the search of motor vehicles incident to arrest, when the suspect is handcuffed and put in the back of a patrol car, is considered reasonable.

Amici are involved in the training of police officers on legal issues in both recruit classes and advanced officer training programs. Most police recruits have not had prior significant exposure to constitutional issues. They are not lawyers and this Court has stated they are not expected to act as lawyers; that these concepts are practical non-technical concepts that deal with the factual and practical considerations of everyday

life on which reasonable and prudent men, not legal technicians act. *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949). Many courts seem to have forgotten this assessment. As a result, it becomes increasingly difficult to train and retrain officers on these concepts.

Amici submit that it is preferable, when possible, for police officers to have a standardized rule that guides them for the sake of their safety and effectiveness and for the sake of the civil rights of those with whom they come in contact. The vast majority of police officers do not want to violate citizens' civil rights, as they realize they enjoy the same rights. Law enforcement officers are taught to respect and protect the civil rights of all persons. They look to the courts for direction on how best to provide that respect and protection. The adoption of "bright line" rules such as *Belton* and its progeny provide the best guidance and protection for our police officers and our citizens.

CONCLUSION

Amici Curiae respectfully request the Court to reverse the Arizona Supreme Court decision and preserve an effective legal tool that allows law enforcement officers to properly seize evidence and

contraband while practicing officer safety. This rule has made officers more effective and safe by allowing a fleeting window of authority that minimally impacts the privacy interests of arrested suspects. We ask the Court to uphold the constitutionality of the law enforcement conduct involved in this case on the law and as a matter of sound judicial policy.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

RODNEY JOSEPH GANT,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

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BRIEF OF FLORIDA, ALABAMA, ALASKA, CALIFORNIA, COLORADO, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, WASHINGTON, WISCONSIN AND WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

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STATEMENT OF AMICI INTEREST

The Amici States have a direct interest in this case because by failing to apply the bright-line test from this Court's *Belton* and *Thornton* cases, the Arizona Supreme Court effectively cast into doubt the actions of law enforcement in searching vehicles incident to arrest pursuant to the *Belton* rule. The ruling of the Arizona Supreme Court casts doubt on an important bright-line test that courts and officers in the field have relied upon since its inception twenty-seven years ago. The Amici States possess strong interests in ensuring that the workable and important *Belton* rule remains the law of the land, because searches of vehicles incident to contemporaneous arrests of often dangerous suspects are necessary to prevent the kind of "second guessing" by police officers that could threaten the safety of officers and the public, lead to the escape of arrestees, and result in the destruction of critical evidence in the fight against crime.

SUMMARY OF ARGUMENT

This Court should reaffirm the *Belton* rule and hold that it should have been applied to Gant's case. The doctrine of stare decisis dictates that the Court should continue to adhere to the bright-line *Belton* rule, which has been in existence for twenty-seven years. Courts and law enforcement officers across the country have relied on this rule since its inception, finding that every arrest involving a mobile vehicle presents inherent risks that justify a contemporaneous, warrantless search of the vehicle incident to the arrest. The Court adopted this straightforward rule in *Belton*, and it has proven

workable ever since. Moreover, *Belton* was reaffirmed by this Court in 2004. There are no special justifications warranting a change to a case-by-case approach, which would require officers to second guess themselves in making quick, ad hoc decisions in the field. *Belton* should remain the law of the land.

In the area of police procedure, the need for clear, workable rules is particularly paramount. *Belton*'s allowance of searches incident to arrest has protected officers and the public in a wide array of fast-moving and hazardous arrest situations involving automobiles. There should be no need to analyze the particulars of every arrest that occurs in public, on the side of the road, and involving a mobile vehicle; instead, even if it is later determined that the arrestees were secured and posed no danger, the need to search vehicles contemporaneous with such inherently dangerous arrests remains a vital tool in protecting the public and fighting crime.

Protection of law enforcement and the public, as well as the preservation of easily destructible evidence, makes *Belton's* clear-cut rule crucial for law enforcement. Officers need the rule's guidance; without it they would be subject to a host of dangerous situations in making on-the-spot determinations in every arrest involving a vehicle. Courts would then be placed in a position of determining, after the fact, whether each search of an automobile was reasonable under the Fourth Amendment. Such an ad-hoc approach is neither necessary nor desirable.

Lastly, the need for continuance of the *Belton* rule is borne out by statistics showing rising violent crime rates, deaths and assaults involving officers while making arrests involving vehicles, as well as the continued rise in gang activity and drug trafficking. These acutely dangerous criminal activities make warrantless searches of vehicles incident to arrests an immensely important part of law enforcement's arsenal to protect the public and preserve evidence. Without the bright-line *Belton* rule, the effectiveness of law enforcement efforts will be diminished and the potential for volatile arrest situations to end in tragedy will increase. This Court should therefore reaffirm the *Belton* rule and overrule the Arizona Supreme Court's reasoning that the rule did not apply to Gant's case.

ARGUMENT

I. PRINCIPLES OF STARE DECISIS NECESSITATE THIS COURT'S CONTINUED ADHERENCE TO THE RULE FORMULATED IN *BELTON* AND REAFFIRMED IN *THORNTON*, AND THE CONTINUED APPLICATION OF THE RULE IN CIRCUMSTANCES SUCH AS GANT'S.

In *New York v. Belton*, 453 U.S. 454 (1981), this Court announced a workable, bright-line rule that has inured to the benefit of law enforcement in its fight against violent crime for twenty-seven years. It has also provided stability and predictability in the federal and state judiciaries, which are called upon to determine the lawfulness of vehicle searches.

The Court reasoned that risks to officer safety, as well as the potential destruction of evidence, are inherent in every arrest that involves a moving vehicle. The Court therefore held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460. In short, due to the inherent risks during an arrest, a contemporaneous, warrantless search of an automobile incident to the arrest of a recent occupant of that vehicle is *per se* justified. Since the announcement of this common-sense, important rule, law enforcement and courts from across the United States have relied upon it to protect officers in the field and the public from potentially dangerous criminals.

In *Belton*, the Court specifically intended to create a "straightforward rule, easily applied, and predictably enforced." *Id.* at 459. This exposition of a bright-line rule was in keeping with the Court's reasoning on many occasions that a bright-line rule, especially in the Fourth Amendment context, is important so that the rule can be "readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged." *Id.* at 458 (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. CT. REV. 127, 141). As such, constitutional rules affecting police procedure should not hinge upon a "highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions." *Id.*; *see also*

Thornton v. United States, 541 U.S. 615, 623 (2004) (rejecting "subjective and highly fact specific" assessments that "would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts that *Belton* sought to avoid"); *Michigan v. Long*, 463 U.S. 1032, 1050 n.14 (1983) (stating that *Belton* created a bright-line rule authorizing a search whenever an officer makes a custodial arrest); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that the arrest itself establishes bright-line authority for police to search).

By ignoring this bright-line rule in favor of requiring field officers to determine case-by-case in every arrest whether a warrantless search is actually justified due to safety concerns, the Arizona Supreme Court not only disrupted longstanding precedent and police practice, but also put officers and the public at risk when arrests are made involving easily-mobile vehicles.[1] Based on longstanding practice and reliance, as well as other principles of stare decisis, this Court should reaffirm the clear *Belton* rule and hold that a recent vehicle occupant's arrest inherently justifies a contemporaneous search of the moving vehicle incident to that arrest.

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[1] The dissent in the Arizona Court of Appeals decision noted that the majority "single-handedly discard[ed] the bright-line rule" laid out in *Belton*. Pet. App. B. at 19, ¶ 22. The dissent argued that the majority's decision "returned Arizona law enforcement officers 'to the uncertain and dangerous environment' in which, facing a highly volatile situation, they must calculate the probability that weapons or destructible evidence may be involved and estimate what items were or were not within the arrestee's reach at any particular point." *Id.* at 22, ¶25; Pet. Brief, pg. 8 (citations omitted).

A. No Special Justification Exists for Disregarding the Principles of Stare Decisis and Overruling the Bright-Line *Belton* Rule.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). This Court has stated that while its precedent is not "sacrosanct," overruling it does require "special justification." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989); *see also Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) ("any detours from the straight path of stare decisis in our past have occurred for articulable reasons"). In this case, no special justification exists for overruling the *Belton* rule; rather, solid justifications exist for preserving its bright-line approach.

Considerations in this Court's decisions overruling precedent have included factors such as: the new rule's necessity and propriety; changes in judicial and legislative doctrines since the previous decision; the irreconcilability between a later law and competing legal doctrines or policies; the previous decision's creation of direct obstacles to the realization of important objectives embodied in other laws; whether the precedent is outdated; whether the rule is inconsistent with a sense of justice or social welfare; and whether the decision has proven

unworkable. *See Patterson*, 491 U.S. at 173-74[2]; *see also Payne*, 501 U.S. at 842 (Souter, J., concurring) (reasoning that stare decisis "carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification'"). Applying these factors to the *Belton* rule, considerations such as the bright-line application of this rule in most jurisdictions and the unique requirements of law enforcement procedure necessitate the conclusion that stare decisis should protect the continued application of the rule.

1. Other courts in the Amici States have relied on the bright-line, workable rule announced in *Belton*.

As noted by Petitioner, the decision below conflicts with decisions in a host of federal circuit courts, as well as a large number of state courts that

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[2] While these considerations were set out in *Patterson*, a case in which the Court considered the application of stare decisis in the statutory interpretation context, they are used in applications of stare decisis in constitutional law cases as well. *See Randall v. Sorrell*, 548 U.S. 230, 244 (2006); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992). In *Casey*, for example, the Court discussed the "prudential and pragmatic considerations" to determine whether adherence to precedent is favored, including whether: (1) the rule is workable; (2) the rule is subject "to a kind of reliance that would lend a special hardship" to its overruling and "add inequity to the cost of repudiation;" (3) the law has developed in a way that leaves the rule "a remnant of abandoned doctrine;" and (4) "facts have so changed[] or come to be seen so differently" that the rule no longer has "significant application or justification." *Casey*, 505 U.S. at 854–55.

have come to rely upon the clear, bright-line rule announced in *Belton*. The Arizona Supreme Court recognized that "most other courts," when presented with the same circumstances, have found the *Belton* rule controlling. *State v. Gant*, 162 P.3d 640, 645 (Ariz. 2007). The bright-line application of the *Belton* rule by nearly every court to have considered it demonstrates that stare decisis considerations support this Court's continued adherence to this precedent. A new rule would not be necessary or proper, because the *Belton* rule is not irreconcilable with other rules and is not unworkable, does not conflict with an arrestee's limited Fourth Amendment rights under specific circumstances, and is not outdated. For these reasons, the workable *Belton* rule should be reaffirmed by this Court.

Courts across the country have adhered to the *Belton* rule since its inception in 1981. First, Federal Courts of Appeals that have considered the issue in *Gant* have held that a search is valid under *Belton* regardless of whether the arrestee is handcuffed or secured in a patrol car. *See, e.g.*, *United States v. Barnes*, 374 F.3d 601, 604 (8th Cir. 2004) ("The lawfulness of the search does not depend on whether the occupant was *actually capable* of reaching the area during the course of the police encounter."). In other words, the bright-line rule announced in *Belton* "did away with [the] fact-specific inquiry into reachability." *Id.*; *see also Northrop v. Trippett*, 265 F.3d 372, 379 (6th Cir. 2001) ("So long as the defendant had the item within his immediate control near the time of his arrest, the item remains subject to a search incident to an arrest."); *United States v. White*, 871 F.2d 41, 44 (6th Cir. 1989) (holding that

"even after the arrestee has been separated from his vehicle and is no longer within reach of the vehicle or its contents, the *Belton* rule . . . applies, and such a search is valid."); *United States v. Karlin*, 852 F.2d 968, 972 (7th Cir. 1988) (upholding search incident to arrest where defendant was arrested, handcuffed, patted down, and placed in squad car); *United States v. McCrady*, 774 F.2d 868, 872 (8th Cir. 1985) (upholding search of locked glove compartment after defendant arrested and placed in patrol car as a search incident to arrest); *United States v. Cotton*, 751 F.2d 1146, 1148 (10th Cir. 1985) (finding that *Belton* does not require arresting officer to undergo a detailed analysis at the time of arrest to determine whether the handcuffed arrestee could reach into the car to seize an item within it).[3]

Second, in Florida (as in other states, discussed below), the *Belton* rule has become enshrined as part of state law. Shortly after *Belton*, Florida's Second District Court of Appeal stated:

> [W]e believe the Supreme Court in the *Belton* case has foreclosed the option of

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[3] Federal Courts of Appeals have also upheld searches under *Belton* in situations in which the arrestee has been handcuffed and placed in a patrol car without specifically addressing the issue. *See United States v. Mapp*, 476 F.3d 1012, 1014 (D.C. Cir. 2007) (upholding search of arrestee's car conducted after he had been handcuffed and placed in patrol car); *United States v. Hrasky*, 453 F.3d 1099, 1100, 1103 (8th Cir. 2006) (same); *United States v. Weaver*, 433 F.3d 1104, 1107 (9th Cir. 2006) (same); *United States v. Osife*, 398 F.3d 1143, 1144, 1146 (9th Cir. 2005) (same); *United States v. Herndon*, 393 F.3d 665, 668 (6th Cir.), *vacated on other grounds*, 544 U.S. 1029 (2005), (same).

> determining on a case-by-case basis whether the interior of an automobile is within the scope of a search incident to arrest. We read *Belton* as establishing a rule applicable to all cases involving the arrest of a recent occupant of an automobile, without regard to the facts in the particular case.

Chapas v. State, 404 So. 2d 1102, 1103-04 (Fla. Dist. Ct. App. 1981). Since *Chapas*, Florida courts have almost uniformly applied the *Belton* rule in a bright-line manner, refusing to consider the facts of the arrest in determining whether vehicle searches are constitutional. *See, e.g., State v. Waller*, 918 So. 2d 363, 366-67 (Fla. Dist. Ct. App. 2005) (reasoning that "courts generally have approved a vehicle search incident to a lawful arrest as a matter of course . . . because such a practice provides much more of a bright-line rule than requiring officers to consider, on a case-by-case basis, whether there is truly a risk to safety or evidence"); *State v. Saufley*, 574 So. 2d 1207, 1209 (Fla. Dist. Ct. App. 1991) (finding that under *Belton*, "[t]he fact that the search occurred after Saufley was placed in the patrol car and approximately 2-3 minutes after the arrest does not affect" its validity); *State v. McLendon*, 490 So. 2d 1308, 1310 (Fla. Dist. Ct. App. 1986) (refusing to distinguish between arrests of persons in a car from arrests of persons recently vacating the car because it would "severely diminish the purpose of the *Belton* decision"); *State v. Valdes*, 423 So. 2d 944, 944 (Fla. Dist. Ct. App. 1982) (holding that search of vehicle was valid notwithstanding the fact that it occurred after defendant was placed in rear of police cruiser).

The same is true of appellate courts in many other states. The *Belton* rule has been overwhelmingly followed and relied upon across the country. *See, e.g., Gundrum v. State*, 563 So. 2d 27, 29 (Ala. Cr. App. 1990) (holding that items were properly received into evidence at criminal trial even though search of car occurred after defendant was arrested and placed in patrol car); *People v. Carter*, 117 P.3d 476 (Cal. 2005) (reasoning that even if defendant had some reasonable expectation of privacy in stolen vehicle, because detention and arrest were lawful, application of *Belton* rule validated search of car occurring while defendant was in patrol vehicle); *People v. Kirk*, 103 P.3d 918, 922 (Colo. 2005) (holding that authority of officers to search a vehicle incident to occupant's arrest is automatic and may be conducted even after suspect has been removed, placed away from the vehicle, and is safely in police custody); *Traylor v. State*, 458 A.2d 1170, 1174-75 (Del. 1983) (stating that because search was incident to lawful arrest, it made no difference that accused was unable to reach items in car at time of search); *State v. Weathers*, 506 S.E.2d 698, 699 (Ga. Ct. App. 1998) (holding that arrest of recent vehicle occupant validates search, and that conclusion is not affected by fact that occupant was sitting in patrol car during search); *State v. Wheaton*, 825 P.2d 501, 503 (Idaho 1992) (upholding search of car incident to arrest where defendant had been arrested, handcuffed, and placed in patrol car); *Black v. State*, 810 N.E.2d 713, 716 (Ind. 2004) (holding that search after defendant exited car and was handcuffed was valid under *Belton*); *State v. Garcia*, 461 N.W.2d 460, 464 (Iowa 1982) (holding that officers could search the car incident to arrest

while defendant was in patrol car); *Rainey v. Commonwealth*, 197 S.W.3d 89, 95 (Ky. 2006) (affirming *Belton* search when defendant "was so far from his vehicle that it was unlikely he could have accessed it"); *State v. Laplante*, 534 A.2d 959, 963 (Me. 1987) (holding that even when occupant is outside of car, if defendant was lawfully arrested, search is valid under *Belton*); *State v. Fernon*, 754 A.2d 463, 472 (Md. Ct. Spec. App 2000) (applying *Belton* and holding that "[i]f a contemporaneous vehicle search is constitutional in the absence of security measures, it ought to be lawful when reasonable security measures are promptly utilized before the search is executed."); *State v. White*, 489 N.W.2d 792, 795-96 (Minn. 1992) ("the *Belton* rule is a 'bright line' rule . . . [and] the fact that the defendant is in the squad car at the time the search occurs is irrelevant because *Belton* expressly foreclosed the need for a case-by-case determination of the arrestee's control of the car."); *State v. Harvey*, 648 S.W.2d 87, 89 (Mo. 1983) (reasoning that securing of defendant did not invalidate search of car incident to arrest and that *Belton* should not be confined to its specific facts because a narrow rule would flout the Court's purpose of fashioning a workable rule); *State v. Pittman*, 556 N.W.2d 276, 283 (Neb. Ct. App. 1996) (stating that search incident to arrest after defendant placed in police vehicle is valid under *Belton*, because search conducted within area of arrestee's immediate control at time of arrest); *State v. Miskolczi*, 465 A.2d 919, 921 (N.H. 1983) (finding search valid after defendant was arrested, searched, handcuffed, and placed in rear of police vehicle); *State v. Cooper*, 286 S.E.2d 102, 104 (N.C. 1982) ("The fact that defendant

in this case was sitting in a police vehicle [when the car was searched] instead of standing on the street under an officer's supervision fails to remove the factual setting from the scope of *Belton*."); *State v. Hensel*, 417 N.W.2d 849, 852–53 (N.D. 1988) (holding that search of automobile conducted after defendant was arrested, handcuffed, and placed in police car was valid search incident to arrest); *Nealy v. State*, 636 P.2d 378, 381 (Okla. Crim. App. 1981) (stating that having made a proper arrest of the defendant in the truck, police seizure and subsequent search of sack from under driver's seat was valid under *Belton*); *State v. Watkins*, 827 S.W.2d 293, 296 (Tenn. 1992) (holding that police may conduct a search of the passenger area of a car incident to an arrest even when the arrested person is neutralized in back seat of a squad car under *Belton*); *State v. Garcia*, 801 S.W.2d 137, 141 (Tex. Crim. App. 1990) (finding that search incident to arrest is valid even though defendant is handcuffed and placed in back of police vehicle because *Belton* rule is bright line); *State v. Giron*, 943 P.2d 1114, 1120 (Utah Ct. App. 1997) (reasoning that *Belton*'s timing requirement requires only a routine, continuous sequence of events occurring during same period of time as arrest and thus search was valid though arrestee was handcuffed and no longer in car); *Glasco v. Commonwealth*, 513 S.E.2d 137, 140 (Va. 1999) (stating that defendant's location in back of police cruiser when his car was searched does not alter the validity of the search under *Belton*); *State v. Stroud*, 720 P.2d 436 (Wash. 1986) (stating that under *Belton*, during the time immediately subsequent to suspect being arrested, handcuffed and placed in patrol car, officers are permitted to search passenger

compartment and all unlocked items in a vehicle for weapons or destructible evidence); *State v. Winston*, 295 S.E.2d 46 (W. Va. 1982) (holding that *Belton* search is valid even if defendant is handcuffed or otherwise secured away from the inside of his vehicle); *Vasquez v. State*, 990 P.2d 476, 482 (Wyo. 1999) (holding that *Belton* search is proper "although Vasquez had been removed from the vehicle, handcuffed, and placed in a patrol car"). There is nothing less than overwhelming adherence to the bright-line *Belton* rule among state courts since its 1981 inception.

Third, it is important to note that several state courts have also applied *Belton's* bright-line rule to their own state constitutional search and seizure provisions. *See, e.g., Stout v. State*, 898 S.W.2d 457, 460 (Ark. 1995) ("*Belton* has provided a practical and workable rule for fourteen years, and . . . [c]onsequently, we choose to continue to interpret 'unreasonable search' in Article 2, section 15 of the Constitution of Arkansas in the same manner the Supreme Court interprets the Fourth Amendment to the Constitution of the United States."); *State v. Charpentier*, 962 P.2d 1033, 1037 (Idaho 1998) (applying *Belton* to interpretation of Idaho and federal constitutional search and seizure protections); *State v. Murrell*, 764 N.E.2d 986, 993 (Ohio 2002) (applying *Belton*'s bright-line rule to state and federal constitutional provisions and holding that search was valid when defendant was arrested, handcuffed, and placed in backseat).

In Kansas, for example, the state legislature recently amended its own statutes to reflect the

workability of the *Belton* rule. In that state, searches incident to arrest were governed by a statute requiring that the search be justified as reasonable for one of three purposes: protecting the officer from attack, preventing the arrestee from escaping, or discovering evidence of the crime for which the vehicle occupant was being arrested. *See State v. Anderson*, 910 P.2d 180, 184 (Kan. 1996). The Kansas Supreme Court therefore rejected the State's argument that a search was valid while the driver and passenger were out of the car and there was no suspicion that evidence of the crime for which they were arrested was in the car. *See id.*

The Kansas statute was amended in 2006, however, in recognition of a "desire [for law enforcement] to be able to operate as allowed by the United States Supreme Court in [*Belton*], to search an arrestee and the immediately surrounding area once a lawful custodial arrest has been made." *See State v. Henning*, 171 P.3d 660, 665 (Kan. Ct. App. 2007). The statute was rewritten such that an officer could search a vehicle incident to an occupant's arrest for the purpose of discovering evidence of *a* crime; in other words, not necessarily the crime for which the person was arrested. *See id.* at 669. The appellate court concluded that the search of the automobile while one of the defendants was handcuffed, and for no purpose other than to search for evidence of a crime, was valid. *See id.*[4]

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[4] It is also true, however, that some states have not applied the *Belton* rule to their state constitution search and seizure provisions. *See Pierce v. State*, 171 P.3d 525, 530 (Wyo. 2007); *State v. Eckel*, 888 A.2d 1266 (N.J. 2006); *State v. Gomez*, 932

(Continued...)

In short, the overwhelming and near uniform application of the *Belton* rule as a bright-line standard demonstrates that change is neither necessary nor desirable. The majority of changes in judicial and legislative doctrine have been toward the *Belton* rule and not a recession from it. It should be reaffirmed by this Court.

2. Changed circumstances do not justify reversing the workable *Belton* rule, reaffirmed by this Court in *Thornton*.

As shown, the *Belton* rule is decidedly not outdated, given its consistent bright-line application in many state and federal courts. This Court also recently reaffirmed the *Belton* rule in *Thornton v. United States*, 541 U.S. 615 (2004). Petitioner notes that *Thornton* presented virtually indistinguishable facts from Gant's case, and the Court once again read the longstanding rule to mean that police do not have to assess the exigencies of every arrest prior to deciding whether to conduct a warrantless search. As such, circumstances have continued to justify and require application of the important *Belton* rule.

P.2d 1 (N.M. 1997); *Commonwealth v. White*, 669 A.2d 896, 902 (Pa. 1995); *State v. Blasich*, 541 N.E.2d 40 (N.Y. 1989); *State v. Stroud*, 720 P.2d 436, 441 (Wash. 1986); *State v. Brody*, 686 P.2d 451 (Ore. Ct. App. 1984); *Commonwealth v. Toole*, 448 N.E.2d 1264, 1267 (Mass. 1983). These cases are noteworthy because they demonstrate that states remain free to set the requirements for a vehicle search incident to an arrest at whatever threshold they find proper under their state constitutions.

The Court in *Thornton* reaffirmed the need for a clear rule that can be "readily understood" by police officers, and not dependent on differing circumstances. 541 U.S. at 623. The Court reiterated that "[o]nce an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment." *Id.* As noted by Petitioner, this Court also cited *Belton* in 2001 as demonstrating the importance of bright-line rules in the Fourth Amendment area. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). These cases demonstrate the firm placement of *Belton* within the Court's Fourth Amendment jurisprudence, strengthening the stare decisis argument even further. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980) ("A litigant who in effect asks [the Court] to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence."). In other words, this Court has continuously seen the need for a clear and important rule in this area. *See Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (refusing to overrule the Court's "long and unbroken series of precedents" that would require reconsideration of a "number of other major decisions").

Just as important, not only does the *Belton* rule remain consistent with developments in search and seizure law, it is also a natural offspring from decades of this Court's Fourth Amendment law. As noted, search and seizure jurisprudence has long recognized the importance of "single, familiar standard[s]" for valid searches. *Belton*, 453 U.S. at

458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). The *Belton* Court specifically cited to *United States v. Robinson*, 414 U.S. 218, 235 (1973), in which the Court held that the search of a person incident to an arrest was reasonable and was not subject to a case-by-case analysis of the circumstances of the arrest and search. The decisions in *Dunaway*, *Robinson*, and *Chimel v. California*, 395 U.S. 752 (1969), the case from which *Belton* evolved, have not been overruled. *Belton*'s bright-line rule therefore remains a consistent and vital part of search and seizure jurisprudence, and it is interwoven with several of the Court's well-established precedents. *Cf. Agostini v. Felton*, 521 U.S. 203, 236 (1997) (explaining that precedent was not in line with recent developments in First Amendment law); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996) (decision overruled that had been a "solitary departure from established law"); *United States v. Gaudin*, 515 U.S. 506, 520 (1995) (overruling case that relied on cases which had since been overruled). The *Belton* rule has clearly stood the test of time and should remain the law of the land.

3. Particularly in the area of police procedure, this Court should not overrule constitutional precedent that promotes the social welfare and has proven workable.

Although this Court has stated that decisions involving constitutional interpretation are

vulnerable to reversal, *see Payne*, 501 U.S. at 842,[5] special consideration should be given to precedent in the constitutional law area affecting police procedure. *See Belton*, 453 U.S. at 459-60 ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."). The importance of *Belton* continues to be its ease of application to otherwise complex, widely-varied and dangerous situations faced by arresting officers.

It is vitally important that officers have consistent and readily ascertainable rules to follow in making arrests. For example, this Court recently reaffirmed the longstanding rule in *Miranda v. Arizona*, 384 U.S. 436 (1966), which requires that police officers verbally warn accused individuals of their constitutional rights upon arrest. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000). The Court noted in refusing to overrule *Miranda* that it "has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Id.; see also Mitchell v. United States*, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting) (describing a rule's "wide acceptance in the legal culture" as "adequate reason not to overrule" it).

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[5] *But see Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification.").

Similarly, it would be imprudent for this Court to overrule precedent relied upon by police officers across the nation for the previous twenty-seven years. Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). At no point is consistency and clarity of procedure more important to the integrity of the legal system than in the interactions between citizens and police officers during an arrest. *See Atwater* 532 U.S. at 347 (reasoning that the Fourth Amendment "has to be applied on the spur (and in the heat) of the moment," requiring rules that are "sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made."); *United States v. Pittman*, 411 F.3d 813, 816 (7th Cir. 2005) ("Police shouldn't have to carry well-thumbed copies of the multivolume LaFave treatise on search and seizure with them wherever they go.").

In addition, whether a search is reasonable under the Fourth Amendment requires "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). As described by Judge Richard A. Posner, the reasonableness of a search can be analyzed by using the Judge Learned

Hand formula, weighing the social costs against the social benefits.[6] Here, allowing vehicle searches pursuant to the bright-line *Belton* rule comports with this balance: individuals have a lesser expectation of privacy in moving vehicles, and the social benefits from searching vehicles incident to arrest far outweigh any cost to individual privacy under such circumstances.

The Court's categorical recognition of automobile searches incident to arrest dovetails with its reasoning in many cases that individuals have a lesser expectation of privacy in automobiles. The Amici States agree with Petitioner that this lessened privacy interest must give way to the need to protect the arresting officers and preserve evidence of a crime. It is by now axiomatic that an individual has a reduced expectation of privacy in the contents of his automobile. *See, e.g., Houghton*, 526 U.S. at 303 (reasoning that automobile searches intrude much less upon personal privacy and dignity than searches

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[6] *See* Richard A. Posner, ECONOMIC ANALYSIS OF LAW 747-48 (5th Ed. 1998). Judge Posner describes the Hand formula as demonstrating reasonableness of a search "if the cost of the search in impaired privacy (*B*) is less than the probability (*P*) that without the search the target of the search cannot be convicted, multiplied by the social loss (*L*) of not convicting him." *Id.* at 748. He notes that in courts' analysis, "[a] minimally intrusive search (i.e., low *B*) – a stop-and-frisk or pat-down – is permissible on a lower *P* than a search of the home or an arrest." *Id.* Moreover, "[i]if a search is necessary to prevent the imminent repetition of a crime, which is one of the things that can make *L* large, a lesser showing of probable cause will suffice." *Id.* Judge Posner concludes that "the more serious the crime, the less probable cause the police should be required to demonstrate in order to justify a search." *Id.*

of persons, in light of the everyday exposure of automobiles and their contents to public view, police regulation, and potential involvement in traffic accidents); *California v. Carney*, 471 U.S. 386, 390–92 (1985) (holding that "ready mobility" and pervasive regulation result in a reduced expectation of privacy in motor vehicles); *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (holding that automobile searches are "far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building"). Moreover, this already reduced expectation of privacy is "diminished further when the occupants are placed under custodial arrest." *Robbins v. California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring) (citations omitted), *overruled on other grounds by United States v. Ross*, 456 U.S. 798 (1982); *see also United States v. Edwards*, 415 U.S. 800, 808–09 (1974). As such, *Belton's* bright-line approach properly balances the vital needs of law enforcement and public safety with the reduced expectation of privacy that arrestees like Gant have in vehicles upon arrest. The rule protects police and the public during inherently dangerous arrest situations involving automobiles – places where suspects presumptively have reduced expectations of privacy.

As further evidence of *Belton's* solid foundation, it is noteworthy that state courts have pointed to important and continuing safety and security concerns as part of their reason for applying the *Belton* rule, even in situations when the search occurs while the defendant is handcuffed and secured in the back of a police car. *See, e.g., Fernon*, 754 A.2d at 472 (reasoning that "[i]f a

contemporaneous vehicle search is constitutional in the absence of security measures, it ought to be lawful when reasonable security measures are promptly utilized before the search is executed."). The Maryland Court of Appeals, for example, expressed a desire to encourage the use of safety procedures through the continued application of the bright-line rule. *See id.*[7]

The beauty of the *Belton* rule is its simplicity, and the rule's common-sense approach justifies preserving it now. That law enforcement officers are able to safely and quickly perform their duties of protecting the public and preserving evidence is of paramount importance.[8] Given these concerns, when contrasted with an arrestee's reduced privacy expectation after a vehicle stop, it is critical that this

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[7] These safety concerns are discussed in greater detail in the next section.

[8] Petitioner also appropriately notes that "[o]verruling *Belton* would mean extensive retraining for police agencies across the United States in arrest and search procedures, retraining that requires officers to finely and carefully analyze the circumstances of an arrest to determine whether the situation is dangerous or whether the arrestee or a confederate . . . might reach into the passenger compartment for a weapon or to destroy evidence." Pet. Brief, pg. 39. It is also important to note that the Arizona Supreme Court's case-by-case approach would generate numerous "mini-trials" on the objective and subjective knowledge of police officers that may or may not justify the search in any given situation. Such "mini-trials" would not only result in added expenditures of time and resources in the courts, they likely would result in inconsistent rulings across the country and increase confusion among law enforcement officers in the field.

Court not overrule its precedent in *Belton* in its consideration of Gant's case.

II. PROTECTION OF LAW ENFORCEMENT AND THE PUBLIC MAKES CONTINUED ADHERENCE TO THE *BELTON* RULE VITALLY IMPORTANT.

A. Requiring Officers to Analyze the Particulars of Every Situation When Making an Arrest Necessarily Threatens the Safety of Officers and the Public, and Inhibits Law Enforcement's Ability to Effectively Fight Crime.

In *Belton*, the Court specifically stated that the rule is intended "to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Belton*, 453 U.S. at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). As such, the need for continuance of the clear *Belton* rule is crucial for law enforcement, both for officers' own protection and the protection of the public in law enforcement's efforts to remove dangerous criminals from the streets. The Amici States agree with Petitioner that by requiring police to engage in a case-by-case analysis of every arrest involving a moving vehicle, the Arizona court creates uncertainty, prevents police from effecting safe arrests, and creates a disincentive to safely secure a suspect prior to conducting a moving vehicle search incident to arrest.

There is no doubt that a hazardous Pandora's Box would be opened if a new rule were adopted requiring officers to make ad hoc determinations whether a search incident to arrest is justified, and requiring courts to adjudicate every case based upon specific circumstances surrounding the arrest. *See State v. Gant*, 162 P.3d 640, 647-48 (Ariz. 2007) (Bales, J., dissenting). The result of such an unpredictable rule would be additional threats to safety during the already dangerous apprehension of suspects from moving vehicles, as well as the release of potentially dangerous suspects should courts determine after-the-fact that the search was unjustified based on specific circumstances. Such an unpredictable rule is wholly undesirable. Instead, because *all* moving vehicle arrests involve some sort of danger to the police or the public, the *Belton* rule should continue to justify all searches made incident to such arrests, regardless of the specific threats in each situation.

Belton's bright-line rule presumptively allows searches of passenger compartments incident to arrest in the name of safety, providing clear guidance to officers and respecting the exigencies of work on the streets. As noted by this Court, all arrests, and especially those involving automobiles, are dangerous to officers and the public at large. *See, e.g., Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (arresting automobile occupants presents an "inordinate risk" for officers); *Robinson*, 414 U.S. at 234 n.5 ("The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty"); *see also Washington v. Chrisman*, 455 U.S. 1, 7 (1982) ("Every arrest must

be presumed to present a risk of danger to the arresting officer."). Moreover, the Court noted in *Robinson* that the decision to search a person or vehicle incident to arrest is "necessarily a quick ad hoc judgment." *Robinson*, 414 U.S. at 235.

In essence, there is a zone of danger that surrounds every arrest made in public involving a moving vehicle. Police officers face a zone of physical danger from possible cohorts and the public in the area surrounding the arrest. They also face a temporal zone of danger, in that decisions for safety and security must be made quickly. Gant's case is a prime example, as the officers involved testified that they had safety concerns *even after the suspects were in custody*, due to the unknown circumstances involving the home and the immediate area. Petitioner notes that Officer Griffith was concerned because he and two other officers had three persons in custody, and as such the search was conducted for "officer safety reasons." Pet. Brief, pg. 6. These concerns persisted even after handcuffing Gant and his cohorts because officers still had not accounted for the resident and owner of the home. *Id.* Officer Griffith testified that "strange things" can always happen during arrests, especially in high drug trafficking areas such as the one where Gant was arrested. *See id.* at 6-7. In short, public arrests involving vehicles always present safety concerns and necessitate measures for officer safety, including the searches authorized in *Belton*.

The fact that a vehicle could be towed and stored does not change the mobility of the vehicle, and therefore does not alleviate these safety

concerns. The potential for danger from co-suspects, and the danger that evidence could be removed by suspects or the public, remains in every mobile vehicle situation. *See, e.g., United States v. Doward*, 41 F.3d 789, 790-93 (1st Cir. 1994) (discussing events where suspect's arrest drew a crowd and resulted in suspect's daughter confronting officers); *see also Robinson*, 414 U.S. at 234-35 (reasoning that "[i]t is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop."). Simply put, arrests are "rapidly evolving circumstances fraught with unpredictable risks to life and limb." *Doward*, 41 F.3d at 793. Therefore, a contemporaneous search of the vehicle is of utmost importance, otherwise officers would need to guard the vehicle to prevent a suspect's cohorts or other members of the public from tampering with or removing items from the vehicle. *See, e.g., California v. Carney*, 471 U.S. at 393 (reasoning that "[l]ike the automobile in *Carroll*, respondent's motor home was readily mobile," and therefore it could "readily have been moved beyond the reach of the police."). The proximity of an arrestee to the vehicle, whether handcuffed or not, does not change the fact that officers need to search the vehicle to potentially retrieve weapons or other evidence that could be taken by the public.

The *Belton* rule accordingly permits officers to secure the suspect prior to a vehicle search, rather than searching a vehicle for safety reasons *without* such security. Creating this kind of disincentive for

safety is simply undesirable. *See, e.g., New York v. Earl*, 431 U.S. 943, 948-49 (1977) (Burger, J., dissenting) ("Surely, the Constitution does not require police officers to make the unhappy choice between dereliction of duty and risk of death . . . the Fourth Amendment's proscription against unreasonable searches and seizures [does not] require officers . . . to risk their lives needlessly in the performance of their duty."). In addition, abandonment of the rule could in some cases encourage *arrestees* to seek to be handcuffed and secured in order to avoid a presumptive immediate search of the vehicle.

Petitioner correctly points out that *every* arrest is unpredictable, and officers should not have to engage in a detailed on-the-spot analysis to decide whether a suspect could reach a weapon or evidence in the automobile. Instead, "police must act decisively and cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp." *United States v. Lyons*, 706 F.2d 321, 330 (D.C. Cir. 1983). While there are cases where the suspect is secure and most likely cannot present a safety or evidentiary risk, the Court nonetheless reemphasized in *Thornton* that "[t]he need for a clear rule . . . justifies the sort of generalization which *Belton* enunciated." *Thornton*, 541 U.S. at 622–23. This coincides with the Court's previous observation that a search of a person incident to a lawful arrest, "while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability . . . that weapons or evidence would in fact be found upon the person of

the suspect." *Robinson*, 414 U.S. at 235. Instead, "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment," and therefore "a search incident to the arrest requires no additional justification." *Id.* In affirming a *Belton* search after the defendant was already placed in a police car and handcuffed, the Maryland Court of Appeals, for example, reasoned that "[i]f a contemporaneous vehicle search is constitutional in the absence of security measures, it ought to be lawful when reasonable security measures are promptly utilized before the search is executed." *State v. Fernon*, 754 A.2d 463, 472 (Md. Ct. Spec. App. 2000). Otherwise, the use of safety procedures would be discouraged. *See id.*

Petitioner is therefore correct in noting that every arrest involves some safety hazard, even if the suspect is handcuffed and secured, and the hazards are magnified when the arrest involves a moving vehicle and takes place in a public area. *See, e.g.*, *Plakas v. Drinski*, 19 F.3d 1143, 1144–45 (7th Cir. 1994) (suspect handcuffed in back seat of squad car escaped from squad car and later confronted police); *United States v. Sanders*, 994 F.2d 200, 210, 210 n.60 (5th Cir. 1993) (citing incidents in which handcuffed arrestees killed police officers). Moreover, there is no doubt that persons under arrest, in stressful situations facing serious consequences, will try things that are, at best, foolhardy. *See, e.g., Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (noting that when a suspect is arrested, he is motivated "to take conspicuous, immediate steps to destroy incriminating evidence."); *United States v. McConney*, 728 F.2d 1195, 1207 (9th Cir. 1984).

This Court should not abandon a rule that protects officers from such erratic and dangerous behavior in every arrest situation involving a moving vehicle, regardless of whether measures are in fact taken to secure the arrested individual. As discussed in the next section, these dangers are magnified as violent crime rates and officer deaths continue to make headlines.

B. Rising Violent Crime Rates and the Threat to Officer Safety Make the Bright-Line Rule Critical to Effectuating Arrests Safely.

Lastly, current law enforcement trends and statistics conclusively demonstrate the need for continued adherence to the bright-line *Belton* rule. As noted by the Petitioner, between 1997 and 2006, 100 officers were feloniously killed during traffic stops, and more than 6,000 officer assaults occurred during traffic stops. Pet. Brief, pg. 24. In Florida, for example, sixteen law enforcement officers were killed in the line of duty in 2007 alone, including eight as a result of gunfire, and seven as a result of vehicle assaults or accidents.[9] Nationally, there have been

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[9] The Officer Down Memorial Page, Inc., tracks these statistics nationally and for each individual state. The ODMP is a non-profit organization dedicated to remembering fallen law enforcement officers. *See* The Officer Down Memorial Page, http://www.odmp.org/ (last visited April 24, 2008). In 2007, ODMP statistics show that among the individual states, Florida had the highest number of officers killed in the line of duty in 2007, trailing only the United States Government with seventeen officers killed. *See id.* New York and California were the closest states in terms of number of law enforcement deaths, with thirteen and ten, respectively. *See id.*

twenty-nine deaths in the line of duty as of April 1, 2008, and there were 186 total officer deaths nationally in 2007, including sixty-five by gunfire.[10] These statistics fully support adherence to a rule that allows officers to protect themselves during potentially volatile stops of moving vehicles, while permitting searches of readily-mobile vehicles.

Additionally, the continued rise of particularly dangerous criminal activities, such as gang activity and drug trafficking, makes the need for a bright-line rule all the more apparent. Last year in Florida, the Attorney General initiated a comprehensive and collaborative Statewide Gang Reduction Strategy aimed at reducing such activity in the State, which has seen the largest growth of gangs in recent years in the nation.[11] The Attorney General noted that

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[10] *See id.* Petitioner cites national crime statistics in noting that "between 1997 and 2006, 133 of the 562 officers feloniously killed were killed during arrest situations." Pet. Brief, pg. 24 (citing FBI U.S. Dep't. of Justice, *Uniform Crime Report: Law Enforcement Officers Killed and Assaulted*, http://www.fbi.gov/ucr/killed/2006/feloniouslykilled.html, Table 19 (2006) (*Uniform Crime Report*); *FBI Uniform Crime Report*, http://www.fbi.gov/ucr/killed/2006/officersassaulted.html, Table 66 (2006)). Notably, 64 of the 100 officers killed during traffic stops between 1997 and 2006 were killed during routine traffic stops. *See id.* at Table 19.

[11] *See* "Attorney General Announces Collaborative Efforts to Develop a Statewide Anti-Gang Strategy," October 25, 2007, *available at* http://myfloridalegal.com/newsrel.nsf/newsreleases/ (last visited April 24, 2008). The Florida Department of Law Enforcement published its 2007 Statewide Gang Survey Results, indicating a high percentage of gang members commit violent crimes, and that police activities in relation to gangs are on the rise. *See* 2007 Statewide Gang Survey Results, Florida

(Continued...)

"[t]hese gangs traffic illegal drugs throughout Florida's communities; are involved in an increasing number of violent crimes utilizing firearms; regularly commit acts of violence and threaten public safety; and commit a large number of personal and property crimes."[12] These findings ultimately led to the enactment of proactive anti-gang legislation in the State of Florida.[13] In short, the rise of such mobile and violent criminal activity in Florida and other states poses a highly acute threat to law enforcement and the public.

The increase of such violent activity, which obviously involves the frequent use of moving vehicles, underscores the continued need for the

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Department of Law Enforcement, October 2007, *available at* http://myfloridalegal.com (last visited April 24, 2008).

[12] *See id.*; *see also* "Attorney General McCollum Launches Gang Reduction Strategy Summit," December 19, 2007, *available at* http://myfloridalegal.com/newsrel.nsf/newsreleases/ (last visited April 24, 2008); "McCollum: Education, Prevention, Rehabilitation Key to State Gang Strategy," January 30, 2008, *available at* http://myfloridalegal.com/newsrel.nsf/newsreleases/ (last visited April 24, 2008).

[13] *See* "Attorney General, Legislative Leaders Announce Tough Anti-Gang Legislation," January 23, 2008, *available at* http://myfloridalegal.com/newsrel.nsf/newsreleases/ (last visited April 24, 2008). The new legislation follows recommendations by a Statewide Grand Jury that include enhanced penalties for being the leader, or "kingpin," of a gang, requirements for gang registration for convicted gang members, civil causes of action against gang members, additional RICO predicate incidents for gang activities, driver's license suspensions for members, and a new crime for being a habitual offender for gang-related activities. *See id.*

clear, workable rule announced in *Belton* and reaffirmed in *Thornton*. Law enforcement officers simply should not be required to risk their own safety, as well as the public's safety, by either failing to secure an arrestee before being permitted to search his vehicle, or waiting for a warrant on the side of a road following a potentially dangerous arrest. Instead, regardless of the specific threats and circumstances that occur in each fast-moving, highly-volatile arrest, officers should be able to protect themselves and the public, as well as preserve evidence in the fight against crime, by searching the vehicle contemporaneous to the arrest. This holding made sense twenty-seven years ago when *Belton* was decided, and it continues to remain a crucial facet of effective and safe law enforcement practice to this day.

CONCLUSION

For all of the above reasons, this Court should reverse the Arizona Supreme Court's judgment and hold that *Belton* should have been applied to Gant's case, such that the search of his vehicle was compliant with the Fourth Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA
Petitioner,

v.

RODNEY JOSEPH GANT
Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, THE STATE OF ARIZONA BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

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No. 07-542

In The
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STATE OF ARIZONA

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Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, THE STATE OF ARIZONA BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing in support of the petitioner, the State of Arizona, as the authorized law officer of the county of Los Angeles, pursuant to Supreme Court Rule 37.2(a) and 37.4.[1]

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1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board of Commission.

(continued...)

INTEREST OF AMICUS CURIAE

Amicus curiae, as the executive officer charged with the prosecution of crime in the most populous county in California, has a strong interest in the effective enforcement of the laws of the state. Prior to this Court's bright-line ruling in *New York v. Belton*, 453 U.S. 454 (1981), the scope of a search of a vehicle incident to a lawful arrest was in a constant state of confusion.[2] The Arizona Supreme Court's

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(...continued)

(Footnote omitted.) It is provided in the California general law that:

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Gov't Code § 26500 (West 1998).

2. *See People v. Fick*, 107 Cal.App.3d 892, 895 (1980) ["Certain closed containers, such as luggage and briefcases, clearly fall within the Fourth Amendment's proscription against warrantless searches because they are "common [repositories] for one's personal effects [and are] inevitably associated with the expectation of privacy." *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979) (quoting *United States v. Chadwick*, 433 U.S. 1, 13 (1977)). Other items, however, are not reasonably associated with an expectation of privacy, and containers whose primary use is something other than as repositories for personal effects do not normally raise reasonable expectations of privacy. (*Guidi v. Superior Court* (1973) 10 Cal.3d 1, 10-14...paper shopping bag; *People v. Diaz* (1980) 101 Cal.App.3d 440, 446-448...paper cup with lid; *People v. Scott* (1979) 95 Cal.App.3d Supp. 8, 11...cigarette box."].

holding in *State v. Gant*, 162 P.3d 640 (Ariz. 2007), abandons this Court's bright-line ruling in *Belton*, reverting to a case-by-case analysis of whether a scene was secure and therefore a search incident to a lawful arrest was not justified.

Retreat from this Court's straightforward holding in *Belton* will return the state of the law to a time when neither the citizenry nor law enforcement know the scope of an officer's authority, hampering an officer in the effective performance of his duties to enforce the laws of the state and uncover and deter criminal activity. It is therefore in the interest of amicus to urge that the ruling of the Arizona Supreme Court calling for a case-by-case analysis of the arrest scene be reversed and that this Court's bright-line ruling in *Belton* be reaffirmed.

SUMMARY OF ARGUMENT

A search of a person incident to a lawful arrest is well-settled. *United States v. Robinson*, 414 U.S. 218, 227 (1973). Balancing the more limited privacy expectation that an arrestee has in a vehicle in which he was a recent occupant, being driven on a public highway, and who has been taken into physical custody based upon probable cause, versus the legitimate needs of law enforcement to be able to search a highly mobile vehicle; to remove from the reach of a suspect or accomplice, any weapons or instruments of escape; to seize and preserve evidence relevant to the arrest and prevent the destruction of evidence; and the need for a clear, bright-line rule that informs both the public and law enforcement of the scope of an officer's authority, a search of the passenger compartment of a vehicle and its containers incident to a lawful arrest is reasonable under the Fourth Amendment.

ARGUMENT

I. THE REASONABLENESS OF A SEARCH INCIDENT TO LAWFUL ARREST IS NOT DEPENDENT ON A CASE-BY-CASE ASSESSMENT OF THE RISK TO OFFICER SAFETY OR THE RISK OF DESTRUCTION OF EVIDENCE

Whether a search of an arrestee's vehicle incident to a lawful arrest is reasonable under the Fourth Amendment is not dependent upon an assessment of actual risk to the safety of officers or the likelihood that evidence will be destroyed. It is well-established that there is a lesser expectation of privacy in a vehicle.

> [C]ontemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a moveable vessel where they readily could be put out of reach of a search warrant. [Citation.]

(*Carroll v. United States* 267 U.S. 132, 151 (1925.)

In *Chambers v. Maroney* 399 U.S. 42 (1970), this Court held that if there is probable cause to believe that contraband or evidence of a crime will be found in a vehicle, that vehicle may be searched without obtaining a search warrant. (*Id.* at p. 52.)

> *Carroll, supra,* holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again, if a warrant must be obtained. Hence an immediate search is constitutionally permissible.

(*Id.* at p. 51.) Because of the mobility of the vehicle, it is impractical to seize every vehicle from the street and obtain a search warrant. The intrusion into the privacy interest of the suspect, can be greater in the seizure of the vehicle while obtaining a warrant, than in the immediate, on-the-spot search of the vehicle.

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

(*Carroll v. United States,* 267 U.S. at p. 153.)

In *United States v. Ross* 456 U.S. 798 (1982), this Court held that where probable cause exists to

search a vehicle, the search that may be conducted is as broad and intrusive as that which a magistrate would authorize in a warrant given the nature of the probable cause.

> The scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize.

(*Id.* at p. 823, n. omitted.) Thus, a driver or passenger of a vehicle is constitutionally protected from having his vehicle searched unless there is probable cause to believe that evidence of a crime or contraband is in the vehicle.

The rubric premised by this Court in the issue presented essentially limits a search incident to lawful arrest to those instances where there is not only a lawful arrest based upon probable cause, but also evidence that an officer's safety was at risk or that evidence was in danger of being destroyed.[3]

With regard to officer safety, reasonableness under the Fourth Amendment does not require the additional showing of actual or threat of danger. The search of an arrestee's vehicle is not equivalent to a pat-down search of a detainee for whom there is but reasonable suspicion allowing only a brief

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3. In the words of Justice Scalia, *Belton* searches would be limited "to cases where is it reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." (*Thornton v. United States, 541 U.S.* 615, 632 (2004), concurring opinion, J. Scalia.)

investigatory detention. (*Terry v.* Ohio 392 U.S. 1, 27-31 (1968).) To require a showing of actual or threatened danger of an arrestee for whom there is already probable cause to arrest for a crime, elevates the privacy expectation of the arrestee above that of the mere detainee.

A rubric that limits a *Belton* search only to instances in which there is reasonable cause to believe that evidence relevant to the crime for which the defendant is being arrested might be found in the vehicle, gives an arrestee a similar privacy interest in his vehicle as the detainee whose vehicle can only be searched upon a determination of probable cause that evidence or contraband is likely to be found within the detainee's vehicle.

This Court has previously recognized a sliding scale of privacy interests, from the nearly non-existent privacy interest of the convicted prisoner serving his sentence in a custodial facility to the increasing privacy expectations of the parolee and probationer. (*United States v. Knights* 534 U.S. 112, 119 (2001).) Likewise, the citizen in his vehicle has a lesser expectation of privacy than the the citizen in his home. (*Carroll v. United States,* 267 U.S. at p. 151.) Similarly, the privacy interest of the arrestee must be lower on the continuum of privacy interests than that of the detainee, for whom probable cause to arrest has not yet been determined. The search of a vehicle of an individual arrested from that vehicle based upon probable cause, does not require an additional finding (in terms of officer safety or destruction of evidence) to be reasonable under the Fourth Amendment.

II. CONSISTENT WITH THIS COURT'S HOLDING IN *NEW YORK v. BELTON* [4] AND BALANCING THE LIMITED EXPECTATIONS OF PRIVACY IN A VEHICLE AGAINST THE LEGITIMATE NEEDS OF LAW ENFORCEMENT, A SEARCH OF THE PASSENGER COMPARTMENT OF A VEHICLE INCIDENT TO A LAWFUL ARREST IS REASONABLE UNDER THE FOURTH AMENDMENT

"The touchstone of the Fourth Amendment is reasonableness." *United States v. Knights,* 534 U.S. at 118. Whether a search is reasonable under the Fourth Amendment is determined by looking at the totality of the circumstances and assessing the privacy interests intruded upon versus the legitimate needs of the government.

> "[U]nder our general Fourth Amendment approach" we "examin[e] the totality of the circumstances" to determine whether a search is reasonable within the meaning of the Fourth Amendment. [*Knights*] at 118, 122 S.Ct. 587, 151 L.Ed.2d 497 (internal quotation marks omitted.) Whether a search is reasonable "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental

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4. *Belton,* 453 U.S. 454.

> interests." *Id.* at 118-119, 122 S.Ct. 587, 151 L.Ed.2d 497 (internal quotation marks omitted.)

Samson v. California, 547 U.S. 843, 126 S.Ct. 2193, 2197 (2006); see also *Wyoming v. Houghton,* 526 U.S. 295 (1999).

Balancing the reduced privacy expectations of an arrestee in a vehicle and the physical custody of the arrestee based upon probable cause, versus the legitimate needs of law enforcement, this Court's bright-line holding in *Belton* is reasonable under the Fourth Amendment. The legitimate needs of law enforcement include *inter alia,* the need to remove from a suspect's reach any weapons or to prevent the destruction of evidence, and the need for a clear rule informing both the public and law enforcement of the scope of an officer's authority. The authority to search a vehicle from which the arrestee was a recent occupant derives from the lawful arrest itself based upon probable cause. *Belton,* 453 U.S. at p. 461; cf. *Robinson,* 414 U.S. at p. 235. Given that arrest versus the needs of law enforcement, a search of the interior the vehicle and its containers without an individualized case-by-case analysis of the circumstances, is reasonable under the Fourth Amendment.

A. AN ARRESTEE'S EXPECTATION OF PRIVACY MUST YIELD TO LEGITIMATE NEEDS OF LAW ENFORCEMENT

In *Knights,* 534 U.S. 112, this Court phrased the privacy intrusion in terms of one's reasonable expectation of privacy. This Court balanced the "significantly diminished" privacy expectations of a

probationer with search conditions against the legitimate needs of the government to monitor probationers while protecting the public. *Id.* at 119-121. Balancing these circumstances, including the probationer's reduced expectation of privacy, this Court found that no more than reasonable suspicion was needed to search the probationer's residence. *Id.* at 121. This Court further held that these same circumstances

> render[ed] a warrant requirement unnecessary. See *Illinois v. McArthur*, 531 U.S. 326, 330, 148 L.Ed.2d 838, 121 S.Ct. 946 (2001) (noting that general or individual circumstances, including "diminished expectations of privacy," may justify an exception to the warrant requirement.).

Id. at 121-122. Thus, in determining the reasonableness of a search and the necessity of a warrant, one's reasonable expectation of privacy is a salient factor. This salient factor has played no less a role in determining the reasonable scope of a search incident to a lawful arrest.

The highest level of expectation of privacy that one can have is in one's person. *Terry v. Ohio,* 392 at 9. It is nevertheless well established that a search incident to a lawful arrest of the person is reasonable under the Fourth Amendment.

> The validity of the search of the person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged until the present case.

Robinson, 414 U.S. at 224. This Court went on to hold in *Robinson*:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which established the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Id. at 235. Thus, notwithstanding the high degree of expectation of privacy in one's person, given the legitimate government interest in searching for, and seizing, evidence of a crime; the need to search for weapons and other instruments by which a suspect could injure or kill an officer or make an escape; and the existence of probable cause to believe the suspect has committed an offense culminating in the suspect being deprived of his freedom and taken into physical custody, the search of the arrestee's person after arrest is reasonable.

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B. GIVEN THE LESSER EXPECTATION OF PRIVACY IN A VEHICLE, THE SCOPE OF A SEARCH INCIDENT TO A LAWFUL ARREST THAT INCLUDES THE PASSENGER COMPARTMENT OF THE VEHICLE IS REASONABLE UNDER THE FOURTH AMENDMENT

While the authority to search the person of an arrestee incident to a lawful arrest was a well-established, straightforward, bright-line rule, prior to this Court's ruling in *Belton,* the *scope* of the search beyond the arrestee's person had been in flux. *Belton,* 453 U.S. at p. 459. In *Chimel v. California,* 395 U.S. 752 (1969), this Court limited the scope of a search incident to a lawful arrest to a search of the person and the area within his immediate control. *Id.* at 762-763. As observed by this Court in *Thornton v. United States,* 541 U.S. at 620, "[a]lthough easily stated, the *Chimel* principle had proved difficult to apply in specific cases", particularly in the context of vehicle searches.

> [N]o straightforward rule has emerged from the litigated cases respecting the question involved here – the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.

Belton, 453 U.S. at 459. Thus, in *Belton,* this Court sought to establish a clear, bright-line rule that would inform law enforcement and citizens alike what the scope of a vehicle search incident to a lawful arrest encompassed. *Id.* at 459-460. This Court stated:

> [W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

Belton, 453 U.S. at 460-461 (footnotes omitted).

Within the framework of a general Fourth Amendment analysis of reasonableness under the totality of the circumstances, balancing the privacy intrusion against the legitimate needs of the government, this Court's holding in *Belton* establishing the scope of the search of a vehicle incident to a lawful arrest as the passenger compartment and any container therein, is reasonable under the Fourth Amendment. Concomitantly, the Arizona Supreme Court erred in this matter in finding the search of respondent Gant's vehicle to be unreasonable. [5]

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5. Arizona's interpretation that *Belton* established only a bright-line rule for the scope of a search and not for the search in the first instance, Joint Appendix, 156-157, is fallacious. The search of a person incident to lawful arrest is well-established. The search of a residence or vehicle incident to that arrest is not a new search, but is indeed a question of the scope of the search incident to the same arrest. This Court sought to create a bright-line rule to guide officers on the proper scope of that search. The bright line established by this Court is meaningless and is of no guidance to law enforcement if the rule does not apply to the initiation of the search in the first place. The issue before this Court is whether the bright-line rule established in *Belton* authorizing a limited search of a vehicle incident to a recent occupant's lawful arrest should be re-affirmed.

1. THE ARRESTEE HAS A REDUCED PRIVACY EXPECTATION IN A VEHICLE AND FROM WHICH HE HAS BEEN ARRESTED BASED UPON PROBABLE CAUSE

It is well established that one has a lesser expectation of privacy in a vehicle than in one's residence and of one's person.

> Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars, which "travel public thoroughfares," *Cardwell v. Lewis,* 417 U.S. 583, 590, 41 L.Ed.2d 325, 94 S.Ct. 2464 (1974), "seldom serve as ... the repository of personal effects," *ibid.* are subjected to police stop and examination to enforce "pervasive" governmental controls "as an everyday occurrence," *South Dakota v. Opperman,* 428 U.S. 364, 368, 49 L.Ed.2d 1000, 96 S.Ct. 3092 (1976), and, finally, are exposed to traffic accidents that may render all their contents open to public scrutiny.

Wyoming v. Houghton, 526 U.S. at 303; see also *California v. Acevedo,* 500 U.S. 565 (1991) at 578 ["From *Carroll* [*v. United States,* 267 U.S. 132 (1925)] through [*United States v.*] *Ross,* [456 U.S. 798 (1982)], this Court has explained that automobile searches differ from other searches."]; *California v. Carney,* 471 U.S. 386 (1985) at 391, ["'the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office' [Citation.]".]

Further, a search incident to a lawful arrest, presupposes sufficient probable cause to make a custodial arrest.

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

Robinson, 414 U.S. at 235. The intrusion upon the suspect's privacy interest in a vehicle upon a public highway from which he has just been arrested is minimal compared to the privacy intrusion of custodial arrest. A full search of the person is authorized pursuant to lawful custodial arrest and is reasonable under the Fourth Amendment. *Robinson*, 414 U.S. at 235. A search of the vehicle that person recently occupied, in which he could have readily deposited weapons or evidence of the crime for which he is being arrested, is no less reasonable.[6]

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6. Contrary to the lower Court of Appeal opinion in *Robinson*, 414 U.S. 218, that there could be no further evidence of the crime of driving on a revoked license, amicus contends that additional evidence of the crime for which Gant was being arrested, driving on a suspended license, could indeed be found in the vehicle. Traffic tickets for the same offense or letters of notice from the department of motor vehicles, demonstrating Gant's knowledge of the suspended status of his license, often a requirement before conviction, might logically be found in the vehicle.

Regardless of the likelihood of discovering evidence of the current offense however, because of the reduced expectation of privacy of the arrestee in a vehicle versus legitimate governmental interests including the need for a clear, bright-line rule that informs the public as well as law enforcement of

(continued...)

2. LEGITIMATE GOVERNMENT INTERESTS EXIST FOR THE INTRUSION UPON THE PRIVACY EXPECTATIONS OF AN ARRESTEE

It is well-established that the mobility of a vehicle is an exigent circumstance justifying the search of an automobile without a warrant.

> There are, of course, exceptions to the general rule that a warrant must be secured before a search is undertaken; one is the so-called "automobile exception" at issue in this case. This exception to the warrant requirement was first set forth by the Court 60 years ago in *Carroll v. United States,* 267 U.S. 132 (1925). There, the Court recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of an automobile justifies a lesser degree of protection of those interests.

California v. Carney, 471 U.S. at 390. Thus, the mobility of the vehicle and the need for an on-the-spot search and seizure weighs heavily in favor of the needs of the government.

Searches incident to a lawful arrest, in general, are based on the need of law enforcement

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(...continued)

the scope of its authority, a search of the vehicle's interior without individual assessment of the nature of the crime and the likelihood of discovering evidence is reasonable.

> "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the concealment or destruction of evidence. [Citation.]

Belton, 453 U.S. at 457. It is necessarily a determination that is made quickly and under stressful conditions.

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.

Robinson, 414 U.S. at 235; see also *Thornton,* 541 U.S. at 621 ["A custodial arrest is fluid and '[t]he danger to the police officer flows from *the fact of the arrest,* and its attendant proximity, stress and uncertainty,' *Robinson, supra,* 414 U.S. at, 234-235...(emphasis added)."]

Lastly, law enforcement as well as the public, has a need for clear, straightforward rules that can be easily understood.

> When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.

Belton, 453 U.S. at 459-460; see also *California v. Acevedo,* 500 U.S. at 577 ["We have noted the virtue

of providing ' " 'clear and unequivocal' guidelines to the law enforcement profession." ' [Citations.]"]; *Arizona v. Roberson,* 486 U.S. 675 (1988) ["We have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* [*v. Arizona,* 451 U.S. 477 (1981)] as well as *Miranda* [*v. Arizona,* 384 U.S. 436 (1966)]."].

Balancing the reduced privacy expectations that an arrestee has in a vehicle in a public location and who has been taken into physical custody based upon probable cause, versus the legitimate needs of law enforcement to be able to search a very mobile vehicle; to remove from a suspect any weapons or instruments of escape; to prevent the destruction of evidence; and the need for a clear, bright-line rule that informs both the public and law enforcement of the scope of an officer's authority, a search of the passenger compartment of a vehicle and its containers, incident to a lawful arrest is reasonable under the Fourth Amendment. Whether the suspect is handcuffed and placed in a patrol car or is standing next to the vehicle at the time of the search has no bearing on the determination of reasonableness.

III. AS AN ARRESTEE TAKEN INTO PHYSICAL CUSTODY BASED UPON PROBABLE CAUSE, AN ARRESTEE'S PROXIMITY TO HIS VEHICLE OR HIS HANDCUFFED STATUS ARE IRRELEVANT TO THE ISSUE OF REASONABLENESS UNDER THE FOURTH AMENDMENT

Neither the arrestee's physical proximity to his car nor the presence or absence of handcuffs

affects his already diminished expectation of privacy in a vehicle on a public highway. Nor do these factors affect the legitimate needs of law enforcement. The fact that a vehicle *could* be towed and stored does not change the mobility of the vehicle. Any actions other than a contemporaneous search of the vehicle, requires officers to guard the vehicle to prevent an arrestee's friends, family, cohorts or even strangers from tampering with or removing weapons and/or evidence from the vehicle. See *California v. Carney,* 471 U.S. at 393 ["Like the automobile in *Carroll,* respondent's motor home was readily mobile. Absent the prompt search and seizure, it could readily have been moved beyond the reach of the police."].

The proximity of an arrestee to his vehicle, handcuffed or not, does not alter the necessity of law enforcement to look for or retrieve possible weapons or items of evidence that otherwise could be retrieved by passengers, family members, friends or unidentified cohorts, absent a contemporaneous search and seizure. As this Court observed in *Belton*:

> It seems to have been the theory of the Court of Appeals that the search and seizure in the present case could not have been incident to the respondent's arrest, because Trooper Nicot, by the very act of searching the respondent's jacket and seizing the contents of its pocket, had gained "exclusive control" of them. 50 N.Y.2d 447, 451, 407 N.E.2d 420, 422. But under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be

> valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his "exclusive control."

453 U.S. at 462, fn. 5. Further, as this Court observed in *Robinson*:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

414 U.S. at 235. A full search of the person is authorized without further justification for believing that weapons or evidence will be found upon that person. *Id.* The search of a vehicle from which the arrestee has just been arrested, and for which the arrestee has a lesser expectation of privacy than he does in his person, requires no additional justification and is reasonable under the Fourth Amendment. As this Court stated in *Belton,* once a lawful arrest has been made of an individual from a vehicle, an officer may search, incident to that arrest, the passenger compartment of that vehicle and any containers found within. 453 U.S at 460. The search is reasonable

> since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.

Id. at p. 461.

Lastly, an arrestee's proximity to his vehicle and the presence or absence of handcuffs does not affect the need for law enforcement to have clear and straightforward rules to effectively enforce the law and uncover criminal activity.

> In short, "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." [Citation].

Belton, 453 U.S. at 458.

Under the facts of this case, Gant had a suspended driver's license and an outstanding warrant for driving on a suspended license. Joint Appendix, p. 152. Because Gant was arrested, handcuffed and placed in the back of a patrol car *Ibid.,* the Arizona Supreme Court held that the scene was secure and that this Court's holding in *Belton,* 453 U.S. 454, did not apply – that is, neither concern for officer safety nor the preservation of evidence justified the search. *Id.* at 156-157. This ruling is contrary to this Court's holding in *Robinson,* that a search incident to a lawful arrest does not require a "case-by-case adjudication" and that "[i]t is the fact of the lawful arrest which establishes the authority to search." 414 U.S. at 235.

CONCLUSION

For the foregoing reasons, this Court's bright-line rule established in *Belton* should be reaffirmed and the search of Gant's vehicle held to be lawful and reasonable under the Fourth Amendment.

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AMICUS CURIAE BRIEF

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Respondent.

On Writ of Certiorari
to the Arizona Supreme Court

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INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately 35 amicus curiae briefs each year on various issues in this Court and other courts. NACDL previously filed amicus curiae briefs in this Court in cases, like the present one, involving the automobile search-incident-to-arrest doctrine under the Fourth Amendment. *See Thornton* v. *United States*, 541 U.S. 615 (2004); *Arizona* v. *Gant*, 540 U.S. 963 (2003); *Florida* v. *Thomas*, 532 U.S. 774 (2001).

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[1] Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Respondent has filed a global consent to *amicus* filings, and a letter of consent to the filing of this brief from petitioner has been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

In *New York v. Belton*, 453 U.S. 454 (1981), this Court held that police officers may search the passenger compartment of an automobile incident to the lawful custodial arrest of an occupant of the vehicle. This rule is purportedly based on protecting officer safety and preserving evidence. As it has come to be understood and applied in the vast majority of the lower courts, however, the rule is not connected to either goal. The rule also is prone to abuse, and it fails to provide predictable guidance to either officers or motorists who are arrested.

This Court should take this opportunity—consistent with the recent suggestions of several of its Justices—to reconsider and to recast the *Belton* doctrine Specifically, this Court should make clear that police officers may not conduct warrantless, exploratory searches of vehicles incident to arrests for nothing more than traffic offenses. Such a holding would flow directly from traditional Fourth Amendment principles and would ground this area of jurisprudence in actual police practices. Moreover, such a holding would provide a truly workable and easily understood rule for officers, individuals, and courts alike in the scenario that currently gives rise to the vast majority of arrests involving motorists.

ARGUMENT

A. The *Belton* Doctrine, As Understood by Most Lower Courts and Commentators, Is Unsound in Theory and Unworkable in Practice.

1. The Fourth Amendment erects a general prohibition against law enforcement officers' conducting searches without warrants. Accordingly, it has long been hornbook law that warrantless searches are allowed only under narrow and carefully guarded circumstances, and must be "strictly tied to and justified by the circumstances which rendered [their] initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (internal quotation and citation omitted). "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be [one such] strictly limited [circumstance]. It grows out of the inherent necessities of the situation at the time of the arrest." *Trupiano v. United States*, 334 U.S. 699, 708 (1948). Specifically, police officers may conduct warrantless searches incident to arrests for two reasons: (1) "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and (2) "to prevent [the] concealment or destruction" of evidence. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

In *Chimel*, for instance, this Court held that when officers arrest someone in his home, they may search the arrestee's person and "the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Id.* at 763. But the officers' authority does not extend beyond that immediate area, for there is no reason to believe that a person can

reach into "any room other than that in which an arrest occurs." *Id.*

This Court first applied this framework to vehicular searches in *New York v. Belton*, 453 U.S. 454 (1981). Perceiving the need for "a straightforward rule, easily applied, and predictably enforced," this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident to that arrest, search the passenger compartment"—that is, the vehicle's interior—including any containers therein. *Belton*, 453 U.S. at 459-60 (footnote omitted). Four Justices disagreed with this holding, warning that it portended "an extreme extension of *Chimel*," *id.* at 472 (White, J., dissenting), because there was "no chance" that Belton or any of the other arrestees in the case—all of whom had been removed from their car and were under police control at the time of the search—could have grabbed anything inside the car, *id.* at 468 (Brennan, J., dissenting). *See also Robbins v. California*, 453 U.S. 420, 447 (1981) (Stevens, J., dissenting) ("disagree[ing]" in *Belton*'s companion case with the *Belton* opinion), *overruled by United States v. Ross*, 456 U.S. 798 (1982). The majority emphasized, however, that the *Belton* rule "in no way alter[ed] the fundamental principles established in the *Chimel* case," but rather simply "determine[d] the meaning of *Chimel*'s principles in this particular and problematic context." *Id.* at 460 n.3.

More recently, this Court held in *Thornton v. United States,* 541 U.S. 615 (2004), that "the arrest of a suspect who is *next to* a vehicle presents identical concerns regarding officer safety and destruction of

evidence as the arrest of one who is inside the vehicle." 541 U.S. at 621 (emphasis added). Consequently, when officers arrest a "recent occupant" of a vehicle, they may search the interior of the vehicle even if the arrestee was outside his car when approached and arrested. *Id.* at 623-24.

2. The *Thornton* case, however, did not simply iron out a wrinkle in the *Belton* doctrine. It exposed the nonsensical nature of the doctrine, at least as it has come to be understood by the vast majority of lower courts and commentators (and by petitioner and its *amici* in this case). Justice Scalia, writing for himself and Justice Ginsburg, asserted that *Belton*'s apparent assumption that arrestees (such as Thornton and respondent here) who are in handcuffs while their vehicles are being searched might plausibly grab something from their vehicles "stretches [the doctrine] beyond its breaking point." *Thornton*, 541 U.S. at 625 (Scalia, J., joined by Ginsburg, J., concurring in the judgment). Justice O'Connor likewise expressed "dissatisfaction with the state of the law in this area," which she described as "a direct consequence of *Belton*'s shaky foundation." *Id.* at 624 (O'Connor, J., concurring in part). And Justice Stevens, joined by Justice Souter, bemoaned the lack of any "limiting principle" in the *Belton* doctrine that prevents officers from undertaking exploratory searches that lack any justification under *Chimel*'s safety or evidence-preservation rationales. *Id.* at 636 (Stevens, J., dissenting). The plurality did not rebut these criticisms, but rather declined to address them at that time because the petitioner had not argued that *Belton* should be recast or overruled. *Id.* at 624 n.4 (plurality opinion).

3. The vehicular search-incident-to-arrest doctrine, at least as most lower courts and commentators have derived it from this Court's precedent, suffers from three fatal flaws: (a) it generates incongruous results; (b) it is prone to abuse; and (c) it fails to provide clear guidance to police officers or anyone else.

a. The *Belton* rule is divorced from empirical reality and, therefore, leads to incongruous results. The *Belton* rule is based on the assumption that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" 453 U.S. at 460 (quoting *Chimel*, 395 U.S. at 763). But that is simply not so. As the United States conceded in *Thornton*, it is standard police procedure for officers who arrest a motorist to "restrain[]"—that is, to handcuff—"an arrestee on the scene before searching a car that he just occupied." *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (quoting Br. for United States 36-37). Indeed, "[n]ot a single respondent [in a survey given to police departments] said or even suggested that a police officer should search a vehicle while the arrestee is in the vehicle or unsecured." Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 Wis. L. Rev. 657, 676 (2002). "If it was ever true that the passenger compartment is 'in fact generally, even if not inevitably,' within the arrestee's immediate control at the time of the search, . . . it certainly is not true today." *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (internal citations omitted).

Belton thus rests upon an indefensible legal fiction. As the Ninth Circuit matter-of-factly explained, when "the arrestee [i]s handcuffed and secured in a patrol car before the police conduct[] the search, the rational underpinnings of *Belton*—officer safety and preservation of evidence—are not implicated." *Weaver*, 433 F.3d at 1107; *see also United States v. Osife*, 398 F.3d 1143, 1147 (9th Cir.) (criticizing "the prevailing approach, which relies on the legal fiction that a suspect handcuffed and locked in a patrol car might escape and grab a weapon from the passenger compartment of his own car."), *cert. denied*, 546 U.S. 934 (2005); *Commonwealth v. Santiago*, 575 N.E.2d 350, 353-54 (Mass. 1991) (When "[t]he automobile was no longer within the defendant's immediate control[,] [t]here obviously was no danger that he could draw a weapon from the vehicle or attempt to conceal or destroy contraband which remained in it."). Or as Justice Scalia put it somewhat more colorfully, the notion that an arrestee handcuffed and secured in the back of an officer's squad car might nevertheless grab a weapon or evidentiary item inside another automobile "calls to mind . . . the mythical arrestee 'possessed of the skill of Houdini and the strength of Hercules.'" *Thornton*, 541 U.S. at 626 (Scalia, J., concurring in the judgment) (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part)).

But instead of responding to this reality by somehow limiting the reach of the *Belton* rule, courts have tried to make sense of the searches it and *Thornton* condoned by shifting their attention from suspects' locations at the time of *searches* to their locations at the time of their *arrests*. *See Thornton*,

541 U.S. at 621-23; *United States v. Sholola*, 124 F.3d 803, 817-18 (7th Cir. 1997) (collecting decisions to this effect). So long as arrestees were "recent occupants" of vehicles at the time of their arrests, courts routinely conclude that *Belton* allows officers to search their vehicles even after the arrestees have been driven away in patrol cars, *United States v. McLaughlin*, 170 F.3d 889 (9th Cir. 1999); *United States v. McCrady*, 774 F.2d 868 (8th Cir. 1985), and when the police have moved the arrestee's vehicle prior to the search, *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005).

But this shift in focus only makes matters worse. It "abandon[s] our constitutional moorings and float[s] to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find." *McLaughlin*, 170 F.3d at 894 (Trott, J., concurring); *see also Thornton*, 541 U.S. at 629 (Scalia, J., concurring in the judgment) ("agree[ing] entirely with that assessment"). "[W]ide-ranging exploratory searches" are exactly the kinds of searches that "the Framers [of the Fourth Amendment] intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *accord Thompson v. Louisiana*, 469 U.S. 17 (1984). And the Framers intended to do so for a fundamental reason: If there is no identifiable criterion against which to judge the reasonableness of a search, the right to be free from unreasonable searches "evaporat[es]." *Chimel*, 395 U.S. at 765.

b. Because the current doctrine is untethered to any safety or evidence-preservation concerns, it also is prone to abuse. A majority of states allows police

officers to arrest motorists for *any* traffic violation, and all states allow arrests for some such violations. *See* David S. Rudstein, Belton *Redux: Reevaluating* Belton*'s Per Se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 Wake Forest L. Rev. 1287, 1335 (2005); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 250-51 nn.188-89 (1989). And this Court has recently made clear that the Fourth Amendment permits officers to make such arrests, no matter how minor the violations. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (failure to wear seatbelt); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (speeding). (Indeed, even if state law prohibits arresting a motorist for a particular traffic violation, the Fourth Amendment still allows the government to bring a prosecution based on the fruits of an arrest, and accompanying search, conducted in violation of that law. *See Virginia v. Moore,* 128 S. Ct. 1598 (2008).) Finally, the Fourth Amendment interposes no obstacle to officers' using suspected traffic violations as pretexts for stopping people who they really want to scrutinize for other reasons—whether those reasons are grounded in stereotypes, unsubstantiated hunches, or other shaky assumptions. *Whren v. United States*, 517 U.S. 806 (1996); *see also Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

The upshot of all this is that the current search-incident-to-arrest doctrine encourages officers to arrest people whom they would not otherwise arrest, in order to conduct exploratory searches they would not otherwise be allowed to conduct. When *Belton* itself was

decided, Justice Stevens observed in its companion case that:

> [U]nder the Court's new rule, [an] arresting officer may find reason to [take motorists into custody] whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation. That decision by a police officer will therefore provide the constitutional predicate for broader vehicle searches than any neutral magistrate could authorize by issuing a warrant.

Robbins, 453 U.S. at 452 (Stevens, J., dissenting). Time and experience has borne out this concern. It is now an accepted truth that "the *Belton* rule, as applied to arrests for traffic offenses, creates an unwarranted incentive for police officers to 'make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits.'" *State v. Pierce*, 642 A.2d 947, 961 (N.J. 1994) (quoting 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.1(c) (2d ed. 1987)); *accord Camacho v. State*, 75 P.3d 370, 374 (Nev. 2003); *State v. Kirsch*, 686 P.2d 446, 449 (Or. Ct. App. 1984).

One state supreme court justice, in fact, recently recounted police officers' admissions that "[t]he secret" to getting more drug seizures was pulling over motorists for "any and all [traffic] violations" (bad headlights, for example) and then "going beyond the traffic stop." *State v. Pallone*, 613 N.W.2d 568, 588 n.9 (Wisc. 2000) (Abrahamson, C.J., dissenting) (internal quotations and citation omitted). The officers did not divulge how often such arrests and searches result in

nothing more than prolonged invasions of privacy. But given that the officers, by hypothesis, lack probable cause in all of these pretextual stops to believe the drivers are guilty of any drug offense, "we must assume that a significant number of innocent persons" are included in this ongoing dragnet. *United States v. Montoya de Hernandez*, 473 U.S. 531, 545 (1985) (Stevens, J., concurring in the judgment).

c. Even putting all of these problems aside, *Belton* should be reconsidered because it has failed on its own terms. This Court in *Belton* emphasized that a "highly sophisticated set of rules" in this area, "qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions . . . may be literally impossible of application by the officer in the field." 453 U.S. at 458 (internal quotations and citations omitted); *see also Thornton*, 541 U.S. at 622-23 (emphasizing "[t]he need for a clear rule, readily understood by police officers"). Consequently, the chief virtue of the *Belton* rule is supposed to be that it provides "straightforward" and "workable" guidance to police officers and individuals alike. *Belton*, 453 U.S. at 459-60.

But in practice, the *Belton* rule generates confusion instead of dispelling it. The *Belton* rule applies to all "recent occupants" of vehicles. But this Court has advised only that "an arrestee's status as a 'recent occupant' *may* turn on his temporal *or* spatial relationship to the car at the time of the arrest *and* search." *Thornton*, 541 U.S. at 622 (emphasis added). Consequently, police officers, individuals, and courts have been "left with little guidance in determining an arrestee's status as a 'recent occupant.'" *Rainey v.*

Commonwealth, 197 S.W.3d 89, 94 (Ky. 2006), *cert. denied*, 127 S. Ct. 1005 (2007).

There is no hard-and-fast rule with respect to spatial proximity. The federal courts of appeals have been unable to reach any agreement over whether a person who is arrested beyond reaching distance from his vehicle is a recent occupant. *See United States v. Pittman,* 411 F.3d 813, 815-16 (7th Cir. 2005) (detailing split of authority on this issue). In some courts, it is utterly irrelevant "whether the occupant was [ever] actually capable of reaching the area [within the vehicle] during the course of the police encounter." *United States v. Barnes*, 374 F.3d 601, 604 (8th Cir. 2004); *accord United States v. Arango,* 879 F.2d 1501 (7th Cir. 1989); *Rainey,* 197 S.W.3d 89. Other courts hold that arrestees are not recent occupants when they are beyond reaching distance from their vehicles. *See United States v. Edwards*, 242 F.3d 928, 938 (10th Cir. 2001) (suspect arrested 100-150 feet from vehicle); *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993) (roughly thirty feet from vehicle); *United States v. Fafowora*, 865 F.2d 360, 361 (D.C. Cir. 1989) ("approximately one car length away, at the time of their arrest"). Even if this Court were to make clear it *is* necessary for an arrestee to be within reaching distance of his vehicle to constitute a "recent occupant," close factual disputes would still arise with some regularity respecting whether a person was actually within reach of his vehicle when arrested.

Nor is there any real predictability with respect to temporal proximity. Courts have deemed searches "contemporaneous" with arrests when police have

searched the arrestee's vehicle before arresting the suspect, *United States v. Smith*, 389 F.3d 944 (9th Cir. 2004), *cert. denied*, 544 U.S. 956 (2005); *State v. Mounds*, 840 A.2d 29 (Conn. App. Ct. 2004); "immediately" after the arrest, *McCrady*, 774 F.2d at 871-72; *Penman v. Commonwealth*, 194 S.W.3d 237, 241 (Ky. 2006); "shortly" after the arrest, *Sholola*, 124 F.3d at 810; fifteen minutes after the arrest, *Weaver*, 433 F.3d at 1106; and fifty minutes after the arrest, *United States v. Scott*, 428 F. Supp. 2d 1126, 1133 (E.D. Cal. 2006). On the other hand, other courts have deemed searches invalid when officers have conducted them "significantly after the arrest," *Strong v. State*, 138 S.W.3d 546, 555 (Tex. Crim. App. 2004), or thirty to forty-five minutes after the arrest, *United States v. Vasey*, 834 F.2d 782, 787 (9th Cir. 1987).

Additional confusion arises when the police have removed the suspect from the scene before initiating or completing their search of his car. One court has deemed a search valid where the police removed the suspect five minutes before the search began. *McLaughlin*, 170 F.3d at 890-91. Another court has held that a search was valid where the suspect was driven away two and one-half minutes into a three-minute search. *United States v. Doward*, 41 F.3d 789 (1st Cir. 1994). A third court, however, has deemed a search invalid where an officer, who did not realize another officer had driven the arrestee off the premises, found contraband minutes after the arrestee's departure. *State v. Badgett*, 512 A.2d 160 (Conn. 1986).

The law with respect to timing, in short, now reads something like, 'well, thirty-minutes [sic] is too long,

but five minutes is okay and you can delay if you are filling out paperwork but not if you are interrogating or transporting the defendant.' So much for bright lines." *McLaughlin*, 170 F.3d at 895 (Trott, J., concurring).

The predictable result of this uncertainty—as exemplified by this case—is a highly fact-bound and inherently unstable patchwork of jurisprudence. *See United States v. Hrasky,* 453 F.3d 1099, 1102 (8th Cir. 2006) ("The precise context is important to the reasonableness of the search."), *cert. denied*, 127 S. Ct. 2098 (2007); *Scott*, 428 F. Supp. 2d at 1131 ("[I]t is necessary to look at the facts and circumstances of each case . . . ."); *Rainey*, 197 S.W.3d at 95 ("While there is no hard and fast definition of what constitutes 'recent' both in time and distance, *on the facts of this case*, Appellant was a 'recent occupant' and was sufficiently close to the vehicle, in both time and space, for the concerns of *Belton* and *Thornton* to be applicable.") (emphasis added).

And things are only getting worse. One district court, earnestly trying to make sense of *Belton* and *Thornton*, has held that "facts regarding spatial proximity alone . . . may establish a presumption of control over the vehicle," while "facts regarding temporal proximity, while not necessary to establish control, may nevertheless serve to rebut that presumption of control for purposes of determining whether the *Belton* rule should apply." *Mack v. City of Abilene*, 2005 WL 1149807, at *11 (N.D. Tex. May 12, 2005), *aff'd in part and vacated in part on other grounds*, 461 F.3d 547 (5th Cir. 2006). Another district court recently adopted a four-factor balancing

test in which no single factor is determinative. *United States v. Laughton*, 437 F. Supp. 2d 665, 672-73 (E.D. Mich. 2006). Such matrices of presumptions and burden-shifting directives are hardly the stuff of straightforward predictability. To the contrary, such *ex post*, fact-sensitive frameworks "plac[e] police officers in the position of making precisely the sort of *ad hoc* determinations *Belton*'s bright-line rule sought to avoid." *Hrasky*, 453 F.3d at 1107 (Gibson, J., dissenting).

B. This Court Should Make Clear, Consistent with Traditional Fourth Amendment Principles, That Officers May Not Conduct Exploratory Searches of Vehicles Incident to Arrests for Nothing More Than Traffic Offenses.

There is no need for this Court to perpetuate the current unsatisfactory state of affairs. Traditional Fourth Amendment principles provide ready alternatives to *Belton*'s legal fictions in cases—such as this one—that give rise to the vast majority of vehicular search-incident-to-arrest disputes. These doctrinal alternatives would not alter the outcomes of any of this Court's prior decisions, but they would coalesce to provide a truly workable and accessible rule, thereby relieving police officers in cases such as this of the need to make fact-bound inquiries and hairline distinctions at the scenes of arrests. That rule, simply stated, is that officers may not conduct warrantless searches of vehicles incident to arrests for nothing more than traffic offenses.[2]

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[2] As this brief uses the term "traffic offense," it includes violations of the "rules of the road" and regulations respecting licensing. It

1. As respondent ably argues, a straightforward application of the *Chimel* rule counsels an affirmance here. Under *Chimel*, "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston v. United States*, 376 U.S. 364, 367 (1964). Likewise, police may not search an arrestee's vehicle while he is secured at the station house because "the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house." *Chambers v. Maroney,* 399 U.S. 42, 47 (1970). In short, the *Chimel*-driven inquiries of whether it is possible that the arrestee might grab evidence or a weapon from his vehicle should be made with respect to the time of the *search*, not the *arrest*. And if the arrestee is secured in police custody away from a given area, the police may not search that area incident to the arrest.[3]

This Court pledged in *Belton* that the doctrine adopted in that case "in no way alters the fundamental

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does not include more serious offenses committed while driving cars, such as driving under the influence or vehicular homicide. It also is worth noting that even if the police arrest someone for a traffic offense, it is well settled that they may search his vehicle if they have a reasonable belief, based on "specific and articulable [additional] facts," that the car contains weapons or other items that pose a genuine threat to safety. *See Michigan v. Long,* 463 U.S. 1032, 1049 (1983).

[3] The lower court cases the State cites at page 42 and 43 of its brief are therefore inconsistent with this Court's precedent and are nothing more than further evidence of the confusion that *Belton* has sown.

principles established in the *Chimel* case." *Belton,* 453 U.S. at 460 n.3. If that is so, then—contrary to the predominant understanding of the *Belton* doctrine—the police may not search an arrestee's vehicle while he is secured in police custody in the back seat of a squad car. Several state supreme courts, in fact, already apply *Chimel* to vehicular searches in this manner as a matter of state constitutional law. *See State v. Bauder,* 924 A.2d 38, 47 (Vt. 2007) (applying "traditional rule" of making *Chimel* inquiries at time of search); *State v. Eckel,* 888 A.2d 1266, 1277 (N.J. 2006) ("return[ing] to *Chimel*" and holding that state constitution requires its inquiries to be made at the time search is conducted); *Camacho v. State,* 75 P.3d 370, 374 (Nev. 2003) ("follow[ing]" traditional conception of *Chimel* to hold under state constitutional law that inquiries are made at the time of search); *Commonwealth v. White,* 669 A.2d 896, 902 (Pa. 1995) (question is whether arrestee can grab something in the "immediate area [he] occupies *during his custody*") (emphasis added).

As these courts all have recognized, when a person is handcuffed in the back seat of a patrol car, this Court can safely hold as a bright-line rule that he cannot reach anything inside his vehicle. And when the crime of arrest is nothing more than a traffic offense, there is no reason to believe that the arrestee's vehicle itself poses any safety risk such that it needs to be searched in connection with the arrest.

2. In his *Thornton* concurrence, Justice Scalia noted that numerous common law authorities, as well as early authorities from this Court and others, justified searches incident to arrest based simply on a

"general interest in gathering evidence relevant to the crime for which the suspect had been arrested." 541 U.S. at 629 (Scalia, J., concurring in the judgment). He thus suggested that if the holdings of *Belton* and *Thornton* make sense at all, it must be on the ground that officers there were entitled to search the arrestees' vehicles "because the car[s] might contain evidence relevant to the crime for which [they were] arrested." *Id.* Both arrestees, after all, were arrested for drug offenses, so it was arguably reasonable to believe that evidence related to those offenses might be found in the vehicles in which they had just been driving and which were still in the vicinity at the time of arrest. *Id.* at 632.

Recasting *Belton* in these terms—just like the alternative of clarifying that *Chimel* applies with respect to the arrestee's whereabouts when the officers conduct a search—also leads directly to a rule that officers are not allowed to conduct exploratory searches of vehicles incident to arrest for simple traffic offenses. As Justice Scalia explained:

> A motorist may be arrested for a wide variety of offenses; in many cases, there is no reasonable basis to believe relevant evidence might be found in the car. *See Atwater v. Lago Vista*, 532 U.S. 318, 323-34 (2001); *cf. Knowles v. Iowa*, 525 U.S. 113, 118 (1998). I would therefore limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

Id. at 632. Because there is no way that officers could reasonably believe that they might find evidence in an arrestee's vehicle relevant to any traffic violation,

conducting an exploratory search of an arrestee's vehicle incident to such an arrest would clearly violate this conception of the Fourth Amendment.

Some commentators—as well as some *amici* in this case—have begun to debate what level of suspicion would be necessary to trigger Justice Scalia's proposed "evidence gathering" rationale. To the extent that probable cause would be required, the proposal is fully consistent with the Fourth Amendment's current "automobile exception." *See California v. Carney,* 471 U.S. 386, 390-91 (1985); *Chambers,* 399 U.S. at 51. Although the United States criticizes the proposal on this ground (U.S. Br. 30) —as if this Court must strain to give the *Belton* doctrine, like a federal statute, some kind of independent force—the police have no freestanding "entitlement" to search vehicles incident to arrests. *Thornton,* 541 U.S. at 624 (O'Connor, J., concurring in part); *accord id.* at 627 (Scalia, J., concurring in the judgment). Indeed, consistency with other strands of constitutional jurisprudence is clearly desirable, not something to avoid. *See, e.g., People v. Blasich,* 541 N.E.2d 40, 43 (N.Y. 1989) (existence of automobile exception reinforces propriety of limitations on *Belton* doctrine). On the other hand, the proposal, as explained in *Thornton,* might be read to incorporate a lower and perhaps novel standard of suspicion.

This Court, however, need not, and should not, resolve that issue here. The vast majority of cases in which police officers contemplate arresting a motorist involve—just as this one does—nothing more than a traffic offense. And there is no reason whatsoever to believe that searching a vehicle could reveal evidence

of a traffic offense. Driving with a suspended license, speeding, driving with a broken tail light, failing to signal before turning, and other traffic offenses do not involve any material items that an officer might find in a car or anywhere else. On the other end of the spectrum, some motorists—such as the defendants in *Belton* and *Thornton*, who were arrested with drugs on the scene—are arrested for crimes and under circumstances that give rise at least to probable cause to believe that the vehicle contains evidence of the offense. Accordingly, an officer will seldom arrest a motorist with legitimate reason, though less than probable cause, to believe that searching his vehicle would reveal evidence of the crime of arrest. If and when such a case arises, this Court could consider on the basis of full briefing and an actual record what the level of suspicion the Constitution actually requires to search the vehicle. *Cf. Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 345-47 (1936) (Brandies, J., concurring) (better practice is to avoid deciding constitutional issues until they are squarely presented by facts of a case).

3. Prohibiting searches incident to arrests for traffic violations also has a substantial pedigree on its own terms. The "general rule" in the states prior to *Belton*, and prior to the Fourth Amendment's incorporation against the states, was that exploratory vehicular searches could not be justified solely on the basis of contemporaneous traffic arrests. *Pierce*, 642 A.2d at 961-62; *accord* P.A. Agabin, Annotation, *Lawfulness of Search of Motor Vehicle Following Arrest for Traffic Violation*, 10 A.L.R.3d 314, 319-20 (3d ed. 1966) ("relatively well settled" that such "exploratory" searches were unreasonable). Officers

were permitted to search arrestees' vehicles only if "[p]robable cause in the form of an occurrence arising after arrest for a traffic violation [gave] rise to the arresting officer's belief that defendant ha[d] committed . . . another offense." *Id.* at 345.[4]

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[4] For examples of state cases holding that police officers could not search vehicles incident to arrests for traffic violations, see *State* v. *Anonymous*, 276 A.2d 448, 450 (Conn. Super. Ct. 1971) (holding a search of a vehicle incident to arrest unlawful because "[t]here are, of course, no 'fruits'" of operating an unregistered vehicle and "[t]he only instrumentality is the automobile itself"); *Commonwealth* v. *Dussell*, 266 A.2d 659, 661 (Pa. 1970) (concluding that the government could not justify a warrantless search of an automobile simply as incident to arrest for running a red light and failure to have proof of registration); *Virgil* v. *Superior Court, Placer County*, 73 Cal. Rptr. 793, 796 (Cal. Ct. App. 1968) (holding that a search incident to arrest for reckless driving did not justify search of car because the arrestee was "arrested for a traffic violation; nothing more" and the "search could have had no relation to the traffic violation") (quotation omitted); *People* v. *Marsh*, 228 N.E. 2d 783, 792 (N.Y. 1967) (concluding that there are "no 'fruits' or 'implements'" of traffic offenses "except in the most rare of instances"); *State* v. *Call*, 220 N.E. 2d 130, 136 (Ohio Ct. App. 1965) ("The officers had no right to search for or seize the other articles . . . as an incident to the arrest for speeding, because there are no fruits of the crime of speeding and the automobile was the means of committing the offense."); *State* v. *Scanlon*, 202 A.2d 448, 452 (N.J. Super. Ct. App. Div. 1964) (concluding that "motor vehicle violations . . . are not such offenses, in themselves, which raise the kind of inferences which justify searches"); *State v. Harris*, 121 N.W.2d 327, 333 (Minn. 1963) (holding that "[p]olice officers may not ordinarily make searches upon apprehending motorists for simple traffic violations"); *People v. Mayo*, 166 N.E.2d 440, 441 (Ill. 1960) (agreeing that "[t]he power of the police to search and seize at will, merely because a traffic ordinance or law has been violated, does violence to constitutional concepts of security based upon the inviolability of the person and his effects") (quotation omitted); *People v. Zeigler*, 100 N.W.2d 456, 460 (Mich. 1960) (holding that

Indeed, at least one state, after an exhaustive analysis in a case involving driving with a suspended license, has continued to follow this rule on state

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a search incident to arrest for a traffic violation is illegal in absence of probable cause); *People* v. *Gonzales*, 97 N.W.2d 16, 20 (Mich. 1959) (holding that "[t]here were no fruits of the traffic offense to search for, nor any need to search for the means by which it had been committed" when arrest was for defective headlight); *Travers v. United States*, 144 A.2d 889, 891 (D.C. App. 1958) (finding that the search could not be justified as one aimed at discovering the "fruits and evidence" of the crime because there are no fruits and evidence of traffic violations); *People v. Molarius*, 303 P.2d 350, 351-52 (Cal. Ct. App. 1956) (supressing evidence where search "bore no relation to the traffic violation . . . upon which appellants were booked"); *Brinegar v. State*, 262 P.2d 464, 480-81 (Okla. Crim. App. 1953) (holding that "not every arrest of a motorist for a traffic violation would justify a search of the seats and glove compartment for weapons" and that "[t]here must be facts and circumstances observed by the officers to cause them in good faith to believe that the motorist is armed, is dangerous, or apparently intends to escape"); *Elliot v. State*, 116 S.W.2d 1009, 1012 (Tenn. 1938) (holding that arresting officer's authority to search and seize is limited to "offensive weapons and tools of escape and . . . evidence of guilt of the offense for which the lawful arrest has been made" and that the search at issue "had no reasonable relation" to the reckless driving offense).

Federal courts during this era issued similar decisions. *See Grundstrom* v. *Beto*, 273 F. Supp. 912, 916 (N.D. Tex. 1967) (holding search incident to arrest for operating a vehicle with a loud muffler is unjustified because "[t]he search of the interior of a motor vehicle bears no relation to seeking the means by which a traffic offense was committed"), *appeal dismissed* 404 F.2d 644 (5th Cir. 1968); *United States* v. *One 1964 Cadillac Hardtop*, 224 F. Supp. 210, 212 (E.D. Wis. 1963) (concluding that "a minor traffic violation will not generally justify a search of the vehicle and its passengers"); *United States* v. *Tate*, 209 F. Supp. 762, 765 (D. Del. 1962) (concluding that a search incident to arrest for speeding "could not have been . . . for the fruits of the crime [of arrest]—there are no fruits of speeding").

constitutional grounds. *See Pierce*, 642 A.2d at 953-58. The New Jersey Supreme Court reasoned in that case that:

> [I]n the context of arrests for motor-vehicle violations, the bright-line *Belton* holding extends the *Chimel* rule beyond the logical limits of its principle. We reject not the rationale of *Chimel*, but *Belton*'s automatic application of *Chimel* to authorize vehicular searches following all arrests for motor-vehicle offenses.

Id. at 960.

The mid-century understanding of the right against unreasonable searches and seizures also prohibited the use of an arrest for a traffic offense as "a pretext to search for evidence" of some other suspected crime. Annotation, 10 A.L.R.3d at 322 (collecting several cases). When there is "no reason to believe that anything more than a traffic violation ha[s] occurred," officers should not have an incentive to use a traffic arrest as justification for conducting a "broader vehicle search[] than any neutral magistrate could authorize by issuing a warrant." *Robbins*, 453 U.S. at 451-52 (Stevens, J., dissenting). Barring automatic searches incident to arrests for traffic offenses removes the "unwarranted incentive for police officers to 'make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits.'" *Pierce*, 642 A.2d at 961 (quoting 3 LaFave, *supra*, § 7.1(c), at 21).

This case provides a perfect illustration. As the State acknowledges, the police initiated contact with respondent because they received "an anonymous tip

that narcotics activity was occurring at a particular house." Petr. Br. 4. But because the tip was completely unverified, the officers' suspicion that respondent or anyone else at the residence was involved in drug trafficking fell far short of probable cause. When the officers returned to the residence a second time to investigate, they used respondent's apparent traffic violation as an excuse to arrest him and to comb through the interior of his vehicle. That the officers happened to find evidence of narcotics activity during this search should not distract the Court from the reality that they conducted a pretextual search on a level of suspicion that presumably frequently fails to turn up any evidence of criminality.

4. Finally, prohibiting searches incident to arresting motorists for traffic violations would bring the *Belton* doctrine into conformity with this Court's decision in *Knowles v. Iowa*, 525 U.S. 113 (1998). *Knowles* held that officers may *not* conduct a search incident to issuing a *citation* for a traffic violation (in that case, speeding), in part because no evidence of such a violation can exist in the passenger compartment of the car. *Id.* at 118.

Knowles thus leaves officer safety as the only possible justification for continuing to allow searches incident to *arrests* for such violations. But as this case demonstrates, officers are *less* at risk when they arrest motorists for traffic violations than when they issue citations for such violations. Respondent was handcuffed in the back seat of a patrol car during the entire time the officers searched his car, and then he was taken directly to the police station. Only if the officers had let respondent go with a citation would he

have gained access to his vehicle and had any ability to threaten the officers. Hence, the State's argument that the Fourth Amendment actually gave the officers the authority to search respondent's car because they decided *not* to let respondent go with a citation "illuminates the absurdity associated with allowing purely exploratory searches incident to arrest," at least when there is no possibility that evidence relevant to the crime of the arrest will be found in the vehicle. *McLaughlin*, 170 F.3d at 895 (Trott, J., concurring). This Court should decline to indulge that absurdity.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Arizona should be affirmed.

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AMICUS CURIAE BRIEF

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No. 07-542

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101

In The Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

RODNEY JOSEPH GANT,

Respondent.

On Writ Of Certiorari To The Arizona Supreme Court

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The National Association of Federal Defenders (NAFD) respectfully submits this brief as *amicus curiae* in support of respondent.

INTEREST OF *AMICUS CURIAE*[1]

The NAFD was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution, to indigent criminal defendants. The NAFD is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

One of the guiding principles of the NAFD is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. The NAFD has appeared

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

as *amicus curiae* in litigation before this Court and the federal courts of appeals, providing a practical view of the federal criminal justice system as seen through the eyes of counsel who represent a majority of the individuals charged with federal crimes in districts throughout every circuit. The NAFD submits this *amicus* brief because the instant case raises an important constitutional question that will have a pervasive effect on federal criminal practice due to the frequency of searches of vehicles after the arrest of former occupants of such vehicles.

SUMMARY OF ARGUMENT

Empirical evidence from states across the country contradicts petitioner's contention that police officers will be endangered and evidence will be lost unless this Court adopts petitioner's proposed rule that would authorize police to search a vehicle *automatically*, (*i.e.*, to conduct a warrantless search without probable cause or exigent circumstances) after a former occupant is arrested, even after the arrestee is secured in a police car. The rule applied by the Arizona Supreme Court in this case held to the contrary and refused to adopt a rule that authorizes the automatic search of a vehicle incident to an arrest after the arrestee is handcuffed and secured in a police car, and several states have similarly refused to adopt petitioner's rule. Data indicate that the refusal by these states to authorize automatic vehicle searches has not placed law enforcement officers at an

increased risk of being assaulted during traffic stops in those jurisdictions. Nor has it hampered law enforcement by requiring unwieldy fact-based assessments as petitioner claims.

A. Nine states have expressly rejected the automatic vehicle search rule that petitioner contends should be imposed as the nationwide constitutional standard. The Federal Bureau of Investigation (FBI) data from these jurisdictions do not reflect an increased risk of assault on officers during traffic stops. Indeed, although the data in this instance can serve only as a rough proxy for risk, they strongly suggest that the risk of assault on police officers during traffic stops is not related to whether the officers are authorized to conduct automatic vehicle searches. This is so whether the data of the nine states that have expressly rejected an automatic vehicle search rule are viewed in the aggregate as compared to all the other states, or whether the available state-by-state data are viewed individually and compared to the rate of assaults against officers in such jurisdictions before automatic vehicle searches were outlawed.

B. The automatic search of a vehicle is also not necessary to preserve potential evidence. Officers can secure a vehicle as part of the scene at the time of an arrest to prevent access by others and thereby protect evidence that may be in a vehicle from destruction at the hands of the arrestee or third parties. Furthermore, officers remain able to recover potential

evidence from a vehicle consistent with Fourth Amendment standards where appropriate.

C. Interpretation of the Fourth Amendment to not allow automatic vehicle searches after an arrestee is secured provides a straightforward and readily manageable rule. Police officers already must evaluate when an arrestee is secured in the course of performing an arrest. *Ad hoc* determinations of the relative risks that particular arrestees pose are not required because the securing of an arrestee in a police car so diminishes any likelihood that the arrestee can reach his vehicle. It is only after the arrestee is secured that well established constitutional standards of probable cause or exigent circumstances must be met to justify the vehicle search.

ARGUMENT

THE ARIZONA SUPREME COURT'S REFUSAL TO ADOPT PETITIONER'S RULE AUTHORIZING AN AUTOMATIC SEARCH OF A VEHICLE AFTER A FORMER OCCUPANT HAS BEEN ARRESTED AND SECURED DOES NOT ENDANGER LAW ENFORCEMENT OFFICERS NOR DOES IT IMPEDE EVIDENCE PRESERVATION

Petitioner contends that the automatic search of a vehicle after a former occupant has been arrested should be deemed *per se* reasonable under the Fourth Amendment, even after the arrestee has been secured in a police car, and even though the officers do not have probable cause to believe that the vehicle

contains evidence of a crime and there are no exigent circumstances. Asserting that its proposed rule was established by *New York v. Belton*, 453 U.S. 454 (1981), petitioner attempts to justify its rule based on two broad claims. First, it posits that a search of the vehicle is "essential" in every case to protect officers and to prevent the arrestee from destroying evidence that may be inside the vehicle. Pet. Br. 12. This appears to be a claim that all arrests of vehicle occupants somehow rise to the level of exigent circumstances to justify a vehicle search, even when the arrestee is secured outside the vehicle and no identifiable exigencies exist. Second, petitioner claims that the authority to engage in an automatic vehicle search in every case provides the police with "a certain and clear [Fourth Amendment] guideline," *ibid.*

Neither rationale stands up under scrutiny. The FBI's data regarding assaults on police officers during traffic stops indicate that petitioner's assertion of officer safety needs is substantially overstated. The data show that officers in jurisdictions that have refused to adopt a rule that authorizes the automatic search of a vehicle after a former occupant is arrested and secured do not face an increased risk of assaults during traffic stops. Nor is there an increased risk of evidence being destroyed during the course of an arrest in such jurisdictions. Thus, petitioner does not, and cannot, justify a categorical determination that all vehicle arrests somehow present exigent circumstances

that make an automatic vehicle search constitutionally reasonable.

Moreover, this Court's Fourth Amendment doctrine supports the holding of the Arizona Supreme Court below and requires rejection of petitioner's automatic search reading of *Belton*. Respondent demonstrates this in his brief and correctly explains that, under this Court's precedents, the only constitutionally authorized justification for a search incident to arrest without a warrant or probable cause is an exigency such as an immediate risk to officer safety or to evidence. *See* Resp. Br. 11-12; *see also Chimel v. California*, 395 U.S. 752, 762-763 (1969). Respondent also persuasively demonstrates that any decreased expectation of privacy in a vehicle does not eliminate this requirement. *See* Resp. Br. 42; *see also Chambers v. Maroney*, 399 U.S. 42, 48 (1970). It is against this legal backdrop that this brief analyzes the FBI data regarding assaults against law enforcement officers during traffic stops.

A. Empirical Evidence Demonstrates That Police Officers Are At No Greater Risk Of Being Assaulted During Traffic Stops In The Nine States That Have Rejected Petitioner's Proposed Automatic Vehicle Search Rule

Petitioner broadly declares that all "[a]rrests are inherently dangerous," and thus police officers always have a "legitimate need to conduct the search" of a vehicle incident to an arrest of a former occupant,

even after the arrestee is handcuffed and secured in the back of a police car. Pet. Br. 12. Petitioner appears to assume that arrestees can readily escape the confinement of police cars designed to hold criminal suspects; that such arrestees will reach their own vehicles; and that, while still handcuffed, will gain access to the interior of their vehicles to grab a weapon or to destroy evidence. Such a feat certainly would require almost super-human strength and coordination. *Thornton v. United States*, 541 U.S. 615, 626 (2004) (Scalia, J., concurring). And such an arrestee would need to possess exceptional motivation to orchestrate such an armed assault rather than simply escape.

Putting aside whether petitioner's assumption is even plausible, petitioner provides no empirical support (nor does its *amici*) for the contention that the authority to conduct an automatic search of a vehicle after a recent occupant is arrested and secured is necessary for officer safety. In fact, analysis of the available empirical evidence undercuts that contention.

Although not definitive, the data on assaults against officers during traffic stops indicate that police officers do not face a higher risk of assault in jurisdictions that have rejected an automatic vehicle search rule and, instead, have adhered to well established standards of reasonableness that require probable cause or exigent circumstances.

1. The Aggregate Data From The Nine States That Have Expressly Rejected An Automatic Vehicle Search Rule Show No Increased Risk Of Assault Against Police Officers During Traffic Stops

Nine states—Massachusetts, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Vermont, and Wyoming—have expressly rejected, either as a matter of state constitutional or statutory law, petitioner's proposed rule that deems constitutionally reasonable all police searches of vehicles after an occupant has been arrested, even after the arrestee is secured.[2]

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[2] *See Commonwealth v. Toole*, 448 N.E.2d 1264, 1266-1267 (Mass. 1983) (rejecting rule that permits automatic vehicle searches incident to arrest of former occupant without showing of probable cause or exigent circumstances); *Camacho v. State*, 75 P.3d 370, 373-374 (Nev. 2003) ("under the Nevada Constitution, there must exist both probable cause and exigent circumstances for police to conduct a warrantless search of an automobile incident to a lawful custodial arrest"); *State v. Eckel*, 888 A.2d 1266, 1277 (N.J. 2006) ("[A] warrantless search of an automobile based not on probable cause but solely on the arrest of a person unable to endanger the police or destroy evidence * * * is unreasonable."); *State v. Arredondo*, 944 P.2d 276, 284 (N.M. Ct. App. 1997) (reiterating that New Mexico's Constitution rejects "bright-line" rules permitting automatic searches of vehicles in favor of a "fact-specific inquiry" into search's reasonableness) (quoting *State v. Gomez*, 944 P.2d 276, 284 (N.M. Ct. App. 1997)); *People v. Blasich*, 541 N.E.2d 40, 43 (N.Y. 1989) (Although vehicle search may be permitted under other exceptions, the search-incident-to-arrest exception does not permit automatic search of vehicle but is "limited to arrestee's person and the area from within which he might gain possession

(Continued on following page)

These nine states are not grouped in any one region but are spread across the country and they contain nearly 20% of the country's population. United States Dep't of Commerce, *Statistical Abstract of the United States*: 2008, at 21. These states provide an opportunity to examine empirically whether the automatic vehicle search rule is key to officer safety, as petitioner contends, and the data demonstrate that it is not. The experience in these states suggests that rejection of an automatic vehicle search rule does not place police at a greater risk of being assaulted during a traffic stop.

For purposes of this analysis, the state-by-state data underlying the FBI's *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted*, was obtained from the FBI. The number of assaults on law enforcement officers during traffic stops and

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of a weapon or other destructible evidence."); *State v. Fesler*, 685 P.2d 1014, 1016 (Or. Ct. App. 1984) (rule allowing automatic vehicle searches incident to arrest of former occupant does not satisfy the Oregon constitution (citing *State v. Caraher*, 653 P.2d 942 (Or. 1982)); *Commonwealth v. White*, 669 A.2d 896, 901-902 (Pa. 1995) (absent showing of exigency, arrest of vehicle's former occupant does not alone permit search of vehicle under state constitution, even though such is permissible under Fourth Amendment); *State v. Bauder*, 924 A.2d 38, 46-47 (Vt. 2007) (rejecting *Belton* and holding that warrantless vehicle search incident to arrest of former occupant is unreasonable without showing that arrestee could endanger police or destroy evidence); *Vasquez v. State*, 990 P.2d 476, 489 (Wyo. 1999) (adopting a rule that is "a narrower application than *Belton*" and requires that a vehicle search incident to arrest be "reasonable under all the circumstances").

pursuits was totaled for states that, in a particular year, had rejected a rule allowing automatic searches of the vehicles of recent arrestees, in comparison to all other states. The number of assaults in each such state in a year was then divided by the total number of law enforcement officers in the state to account for the different sizes of police forces. The data thus serve as a rough proxy for the risk of assault during a traffic stop faced by an officer in each such state.[3]

Chart 1 shows the data nationwide and compares states that have rejected an automatic vehicle search rule to all other states. It illustrates that, in all but two of the last fifteen years, states that have *rejected* an automatic vehicle search rule have experienced *lower* assault rates on police officers than other states.[4]

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[3] Because the data involve assaults during all traffic stops and pursuits, it involves a larger number of assaults than are directly relevant to this brief's analysis, *e.g.*, assaults that occurred when there was a citation but no arrest, or when the assault did not involve a weapon recovered from the vehicle of an arrestee, or when the assault occurred during a pursuit which typically would not be when the arrestee is secured in the police car. Traffic stops that lead only to citations do not authorize an automatic search of the person or his vehicle. *See Knowles v. Iowa*, 525 U.S. 113 (1998). The data also are not restricted to assaults only by arrestees so that they include assaults by third parties as well.

[4] The number of states that have rejected an automatic vehicle search rule has fluctuated over time, so the analysis includes each state as it changed its laws. States that have operated under both standards during the time period for which

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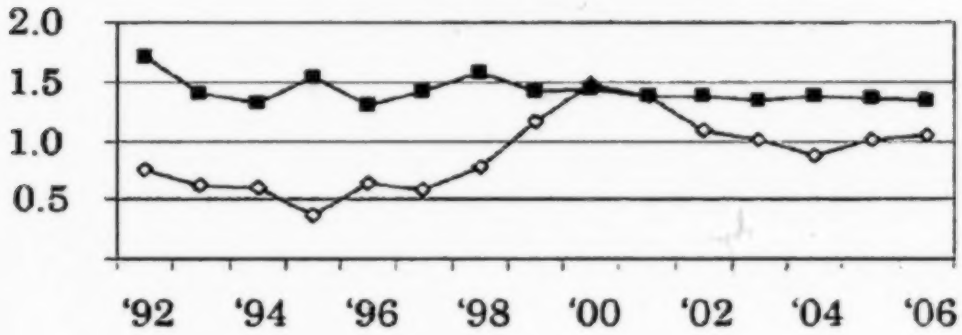
Chart 1

Assaults on Officers During
Traffic Stops and Pursuits
Per 100 Officers
By Legal Rule Governing Jurisdiction



—◇— States That Reject
Automatic Vehicle Search Rule

—■— Other States

Of course, the data do not distinguish between the effects of the prohibition against automatic vehicle searches and the effects of a multitude of other factors on the number of assaults against police officers. But one can also look at the level of violence against law enforcement officers in each of those nine states outside of the context of traffic stops and pursuits to get a sense of the influence of the factors leading to assaults on officers other than those that

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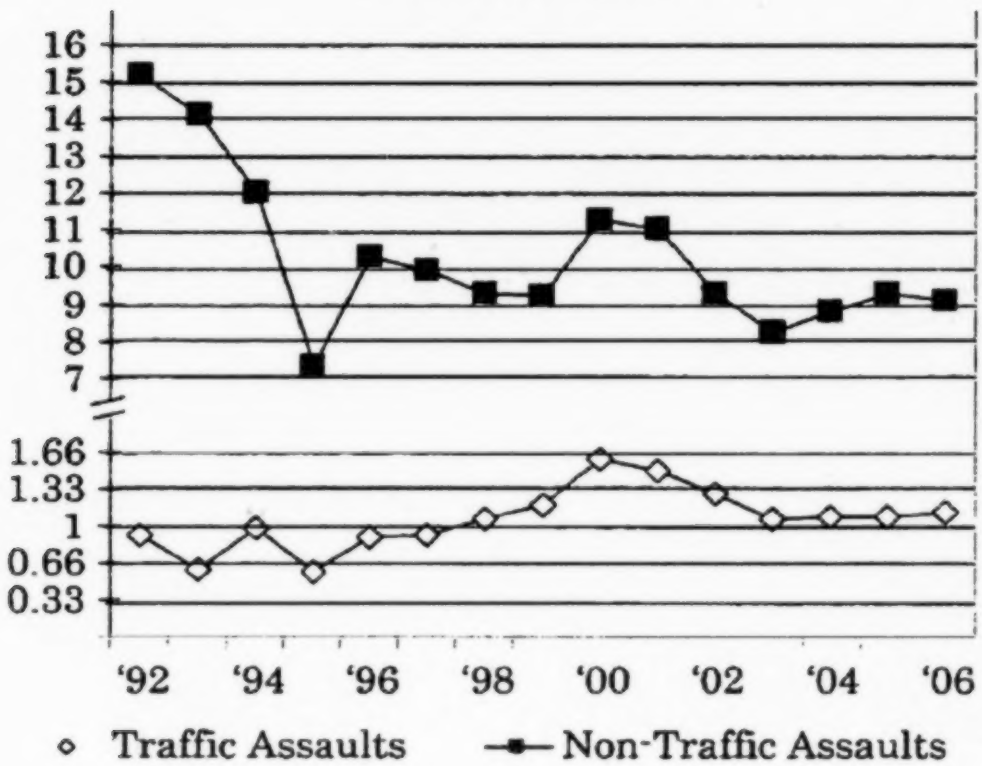
statistics are available are included in the appropriate category for the appropriate year. The FBI data underlying this chart and the following charts are provided at App., *infra*, 1a-3a.

may be unique to the traffic stop context. Chart 2 reflects that data, and it shows that the annual fluctuations for assaults against officers at traffic stops and at other encounters closely correlate. This suggests that the rejection of an automatic vehicle search rule did not lead to an increase in officer assaults in those states.

Chart 2

All Assaults on Officers
in States Rejecting Automatic Vehicle Search Rule
Per 100 Officers



2. Data Are Available In Four Of The Nine States Before And After Their Express Rejection Of Automatic Vehicle Searches, And The Data Reveal No Subsequent Increase In Assaults On Officers During Traffic Stops

The FBI provided data on traffic assaults in years that extended both before and after the year of rejection of the automatic vehicle search rule in only four states—Nevada, New Mexico, Pennsylvania, and Wyoming.[5] The individual state data show that none of these states experienced a sustained upsurge in the number of assaults on police officers during traffic stops following the express prohibition against automatic searches of vehicles incident to arrest. In other words, the data do not support the result one would have expected if petitioner were correct in its claim that an automatic search rule is necessary to ensure officer safety.

This suggests that petitioner and its *amici* are wrong in contending that the risk of harm to officers increases if automatic searches are prohibited. Indeed, to the contrary, the charts below show, like Charts 1 and 2 above, that an automatic vehicle search

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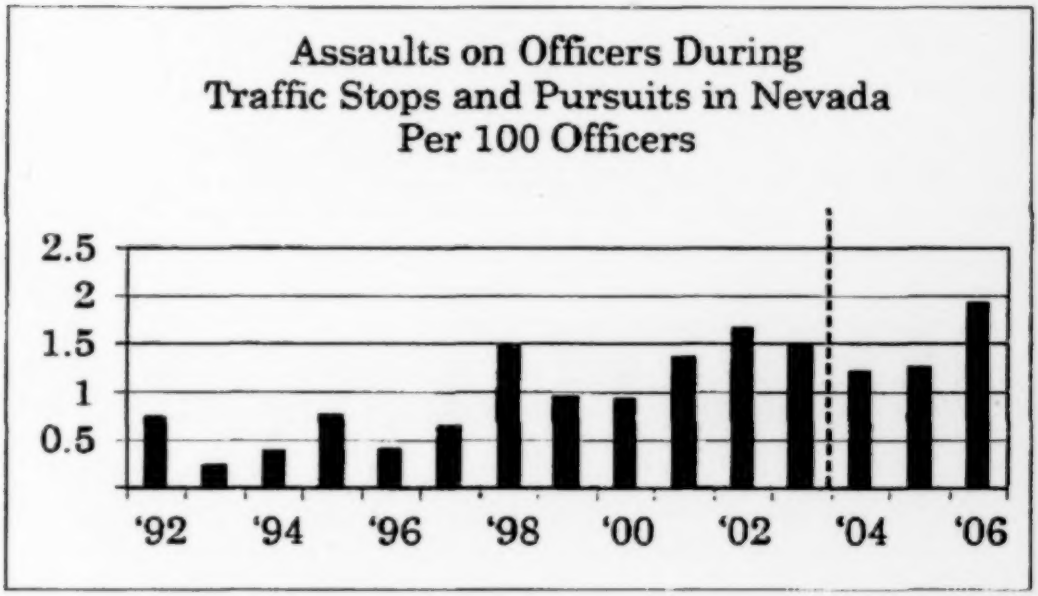
[5] In three of the nine states that have rejected an automatic vehicle search rule—Massachusetts, New York, and Oregon—the rejection of the rule occurred prior to 1992, which is the earliest year for which the FBI state-by-state data is available. In two other of the nine states—New Jersey and Vermont—the rejection of the rule permitting automatic searches occurred so recently that post-decision data are not available.

rule has no real effect on officer safety and that, instead, it is other factors, not that legal rule, that affect the rate of traffic-related assaults on officers during traffic stops. The varying rates of assaults during traffic stops from year to year in each of these four states below simply show that petitioner's automatic search rule finds no empirical foundation in a police officer safety rationale.

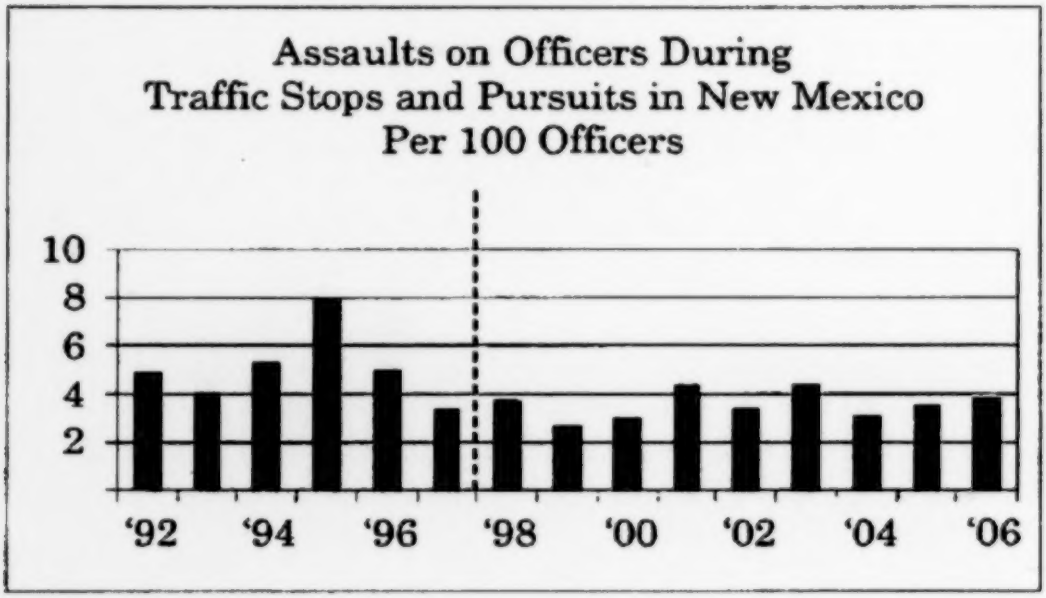
Chart 3



a. Nevada rejected an automatic vehicle search rule in 2003. *See Camacho v. State*, 75 P.3d 370, 373-374 (Nev. 2003). Chart 3 reflects that state's data and shows that immediately thereafter the rate of assaults on officers at traffic stops in fact decreased. The rate of assaults has increased in the years following, but that rate is approximately the same as it was in the years prior to rejection of the rule. Overall,

the data do not establish that there was a substantial increase in the rate of assaults on the state's officers during traffic stops after the state prohibited automatic searches of vehicles incident to arrests.

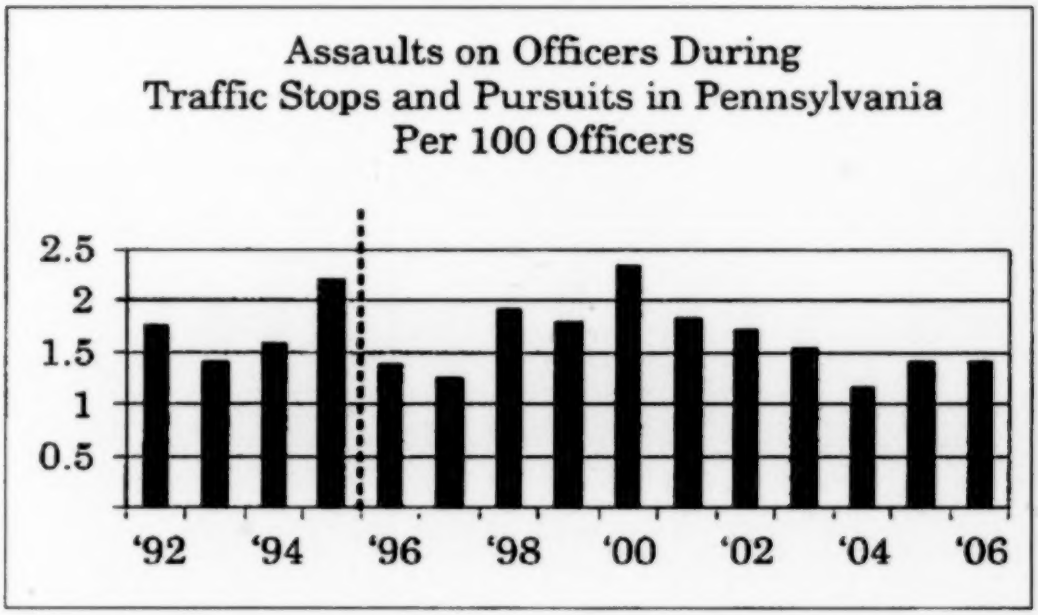
Chart 4



b. The rate of assaults on officers during traffic stops in New Mexico has generally remained similar before and after the state rejected an automatic vehicle search rule in 1997. *See State v. Arredondo*, 944 P.2d 276 (N.M. Ct. App. 1997). Chart 4 demonstrates that even though the rate of assaults on officers slightly increased immediately after *Arredondo*, rising from 3.3 assaults per 100 officers to 3.5 assaults per 100 officers, the average rate during traffic stops of assaults per 100 officers over the course of the nine years since the automatic search rule was rejected is 3.5, which is lower than the average rate of 5.0 assaults per 100 officers

experienced over the course of the five years before rejection of the rule.

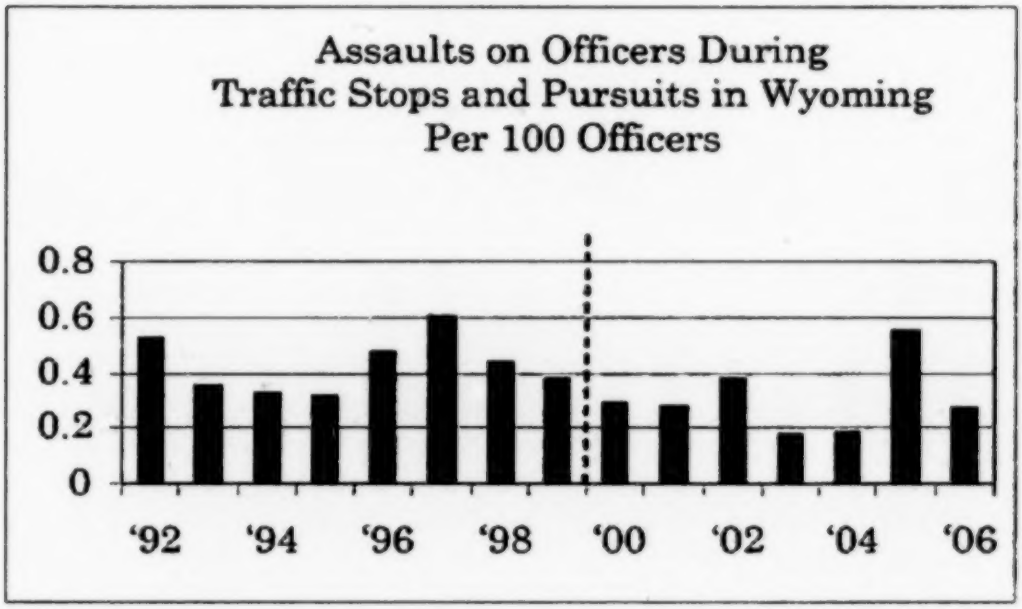
Chart 5



c. Pennsylvania experienced a decrease from 2.2 to 1.4 assaults per 100 officers during traffic stops in the year after it rejected an automatic vehicle search rule that had previously been applied by its lower courts. *See Commonwealth v. White*, 669 A.2d 896 (Pa. 1995); *see also, e.g.*, *Commonwealth v. Mickell*, 598 A.2d 1003, 1009 n.7 (Pa. Super. Ct. 1991). Chart 5 reflects that data. It also shows that in the years thereafter the rate of assaults gradually increased but that the rate has stabilized at a level that is lower than the rate of assaults in any of the four years preceding that decision. This overall decrease in rate of assaults has occurred even though police in

Pennsylvania have not had authority to conduct automatic vehicle searches incident to arrest for the past 13 years.

Chart 6



d. After Wyoming rejected an automatic vehicle search rule in 1999, *see Vasquez v. State*, 990 P.2d 476 (Wyo. 1999), the number of assaults per 100 police officers during traffic stops, which already had been decreasing, continued to decline as illustrated above in Chart 6. A subsequent rise (from .2 assaults per 100 officers to .6 per 100 officers) in 2005 immediately fell the next year (to .3 assaults per 100 officers), and the rate of assaults in 2006 was lower than that prior to *Vasquez*.

In short, the experiences of these four states suggest that prohibiting police officers from

automatically searching all vehicles incident to the arrest of a recent occupant does not increase the risk that such arresting officers will be assaulted during traffic stops. The data regarding the rate of assaults on officers during traffic stops before and after rejection of an automatic vehicle search rule appear to undermine petitioner's contention that having automatic vehicle search authority is necessary to protect officers from the dangers inherent in arrests during traffic stops. Pet. Br. 12, 27.

B. Evidence Preservation Does Not Require An Automatic Vehicle Search Rule Because Officers May Secure Vehicles On The Scene To Prevent Tampering And Because Officers Have The Means To Later Search The Vehicle When Constitutional Standards Are Met

Petitioner and its *amici* also urge this Court to adopt an automatic vehicle search rule based on a claim that a search is necessary to preserve evidence within the vehicle for collection by police officers, including evidence related to criminal charges other than those on which the arrest has been made. Pet. Br. 27.

But law enforcement officers are not entitled to conduct rummaging searches for evidence regardless of probable cause or exigencies. Nor is the automatic search of every vehicle recently occupied by an arrestee necessary for evidence preservation. Officers can protect potential evidence in a vehicle by securing the scene and preventing access to the vehicle during

the course of an arrest. Later, if there is probable cause to believe that the vehicle contains evidence or contraband, or if the police can meet some other recognized Fourth Amendment standard, they can search the vehicle and recover whatever evidence it may contain. Rejection of an automatic vehicle search rule therefore will not end all vehicle searches, as petitioner would lead this Court to believe.

1. To prevent the destruction of evidence at the time of the initial arrest of a former occupant of a vehicle, officers may secure the vehicle as part of a crime scene and thereby prohibit access to it. This Court has read the Fourth Amendment to permit officers to require drivers and passengers to exit a lawfully stopped vehicle. *Maryland v. Wilson*, 519 U.S. 408, 415 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977). And police officers may continue to secure the vehicle "to preserve the status quo" while undertaking their law enforcement duties. *Cf. Segura v. United States*, 468 U.S. 796, 798 (1984) (after arresting occupants of a residence, officers can prevent access to the premises "while others, in good faith, are in the process of obtaining a warrant"). Securing a vehicle sufficiently mitigates any risk that the arrested person or third parties will destroy or tamper with any evidence that it contains.[6]

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[6] Petitioner suggests that an automatic search is necessary because "unknown confederates" of the arrestee may seek access to the arrestee's vehicle. Pet. Br. 25. But petitioner and its *amici* do not cite any instances in which confederates of a handcuffed and secured arrestee invaded the scene and gained access to the

(Continued on following page)

2. After the former occupant of a vehicle is arrested and the scene is secured, other doctrines may permit police officers to search the interior of the vehicle and to preserve any evidence it contains. For example, a police officer may be able to conduct a visual inspection of the interior of a vehicle from a location outside of the car, and any evidentiary items in plain view can be seized and admitted at trial. *See, e.g.*, *Harris v. United States*, 390 U.S. 234, 236 (1968) (registration card, with name of robbery victim on it, was in officer's "plain view" once the door of the vehicle was lawfully opened).

Also, the police may obtain consent to search from the owner or operator of the vehicle and obtain admissible evidence pursuant to such a search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219-220 (1973) (officers found evidence while searching trunk of lawfully stopped automobile pursuant to valid consent). It is not uncommon for those who have been detained or arrested in traffic-related encounters to consent to a search of the vehicle. *See, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 35, 40 (1996) (after being lawfully detained and issued a warning, defendant consented to a search that revealed marijuana in his vehicle); *see also People v. Mezon*, 140 A.D.2d 634 (N.Y. App. Div. 1988) (vehicle search not valid as

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vehicle in order to destroy evidence or to obtain a weapon to use against the arresting officers. In any event, where officers are concerned about "strange things" happening on account of other unsecured individuals, securing the vehicle to prevent access by others makes the most practical sense.

incident to arrest nor justified as an inventory search, but defendant consented to the search).

Furthermore, the police may have reason to impound the vehicle. In such circumstances, officers may have authority to conduct an inventory search of the vehicle which is done pursuant to "standardized criteria" and "on the basis of something other than suspicion of evidence of criminal activity." *Colorado v. Bertine*, 479 U.S. 367, 375 (1987); 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.4(a) (4th ed. 2004) (it is "common practice for the police to conduct an inventory of the contents of vehicles they have taken into their custody or are about to impound"). And it may be that a more extensive search can subsequently be conducted if the officers develop probable cause to believe the vehicle contains evidence or contraband. *Cf. Florida v. Meyers*, 466 U.S. 380, 382 (1984) (per curiam).

In sum, petitioner has not established that the preservation of evidence requires intrusion on a person's remaining privacy interests in the contents of the vehicle by permitting an automatic search of every vehicle recently occupied by every arrestee. Indeed, the fact that nine states have rejected petitioner's rule and yet petitioner points to no data suggesting that there is an increased problem of evidence destruction in those jurisdictions undermines the claimed need for automatic searches as a means of preserving evidence.

C. Interpretation Of The Fourth Amendment To Not Allow Automatic Vehicle Searches After An Arrestee Is Secured Provides A Straightforward And Readily Manageable Rule

Petitioner repeatedly insists that the benefit of its automatic vehicle search reading of *Belton* is that it is a "bright line" that enables officers to conduct protective searches of vehicles incident to the arrest of former occupants without having to make case-by-case assessments of whether such a search is warranted by the threats or risks presented. Pet. Br. 12-14, 29-31. And petitioner mischaracterizes the ruling below as unmanageable, by contrast, because, in its view, the permissibility of a search under the Arizona Supreme Court's holding "depends on an arresting officer's *ad hoc* assessment that he is secure from danger and that evidence will not be destroyed." Pet. Br. 13.

Petitioner misconstrues the ruling below in two ways. First, a prohibition against automatic searches of vehicles incident to arrest of a recent occupant after the arrestee is secure is a straightforward and readily manageable rule. Second, a prohibition on automatic vehicle searches would not require *ad hoc* assessments that would somehow create chaos, but rather would likely lead to even more consistent results than the automatic vehicle search rule that petitioner advocates. It is, in fact, petitioner's automatic vehicle search reading of *Belton* that

involves *ad hoc* assessments about recent occupancy and related questions.

1. Prohibition of the automatic search of a vehicle as incident to arrest (*i.e.*, requiring officers to apply well established reasonableness standards of probable cause or exigent circumstances) after an arrested former occupant has been handcuffed and secured in the back of a police car will not require a cumbersome fact-specific analysis in every case. Rather, such a rule establishes a clear and consistent standard for officers to follow: no vehicle search incident to arrest after the arrestee is secured. Courts and commentators have noted that a prohibition against automatic vehicle searches draws a line that is every bit as "bright" as petitioner's automatic search reading of *Belton*, and one that is far more consistent with reality and prior precedent. *See State v. Eckel*, 888 A.2d 1266, 1277 (N.J. 2006) ("If any bright line had been necessary to resolve the issue in *Belton*, it would have been the *opposite* of the rule that the Court announced. * * * [O]ccupants almost invariably are removed before the automobile is searched; and once they have been removed, there is no longer much chance that they can secure weapons from the automobile or destroy evidence there." (quoting Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 274 (1984)) (emphasis added)).

A prohibition against automatic vehicle searches after arrestees are secured does not demand that officers "sift through a plethora of varying

circumstances to determine whether they have authority to search," Pet. Br. 14, to any greater degree than petitioner's automatic search reading of *Belton*. After all, under petitioner's rule, officers must determine, for example, whether an arrestee is a recent occupant of a particular vehicle to justify the automatic search, and that determination is far from obvious in many instances. By contrast, because it is clear when an arrestee has been locked in the back of a police car, it would be clear to officers to apply the rule that prohibits a search of a vehicle at that point, unless the general Fourth Amendment standards for searching the vehicle are met.

The relative ease of application of a rule that does not permit automatic searches of vehicles derives primarily from the fact that the arrest and securing procedures are typically standardized in virtually all jurisdictions. Indeed, law enforcement manuals often provide detailed instructions for handcuffing suspects, for conducting protective searches of arrestees' bodies, and for making sure that "prisoners are *secured* in the rear seat" of the police car. *See, e.g.*, Police Dep't, City of Cincinnati, Ohio, *Procedure Manual* § 12.600(D)(8) (rev. 2007) (emphasis added).[7] Thus, a rule that prohibits the

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[7] *See also, e.g.*, Police Training Comm'n, New Jersey Div. of Criminal Justice, *Performance Objectives* §§ 10.6, 10.7, 10.9 (rev. 2006) (requiring that police officers conduct searches of people and vehicles safely and use handcuffs to prevent attack); Police Dep't, City of Lawrence, Kan., *Procedure Manual* § 00-70 (2006) (advising that all persons arrested be handcuffed or otherwise secured).

search of a vehicle after an arrestee is secured relies on a concept that is quite familiar to officers.

A rule against automatic vehicle searches after an arrestee is secure is also likely to produce predictable and consistent results, given that the relevant factor—whether or not the arrestee is secured—is based largely on circumstances that are controlled by the police themselves. Police officers have every incentive to follow whatever standardized steps their departments have delineated for making arrests and securing arrestees in order to protect themselves and third parties. And having done so, an officer will know that subsequent searches of the arrestee's vehicle are prohibited, except in those circumstances in which the officer reasonably determines that probable cause exists to believe that the vehicle contains evidence or contraband, or where there are exigent circumstances that pose a risk to the safety of the officer or others.

The argument that a rule against automatic vehicle searches when arrestees are secured would nonetheless be difficult for the police to implement in practice because it forces officers to choose between securing an arrested former occupant and conducting a vehicle search, *see Amicus* Br. of the Nat'l Ass'n of Police Org. at 3, mistakenly "assumes that, one way or another, the search must take place." *Thornton*, 541 U.S. at 627 (Scalia, J., concurring). Officers ordinarily protect themselves by securing suspects before undertaking other duties. *See, e.g.*, Police Dep't, City of Cleveland, Tenn., *General Orders*

Manual § 11-G (rev. 2007) (prisoners should be handcuffed before they are searched); Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 665-666, 675-676 (citing officer manuals that require officers to secure an arrestee before searching the area). Holding that a search of a vehicle incident to arrest can proceed only upon a showing of probable cause or exigent circumstances once an arrestee is secured mandates nothing different.

There is nothing unfair or unreasonable about a rule that means that officers must forgo the automatic search of a vehicle if they first secure an arrested suspect, because a search of a vehicle in the absence of probable cause does not occur at the officer's *option*—it is only authorized as a result of potential dangers that do not persist after the arrestee has been secured. *See Chimel*, 395 at 762-763. And "if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable *precisely because* the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures." *Thornton*, 541 U.S. at 627 (Scalia, J., concurring) (emphasis in original).

2. Petitioner's automatic vehicle search rule requires several determinations that are not always easy for officers to make. This is because, as petitioner admits, vehicle searches under the automatic search reading of *Belton* are "limited"

based on factors such as how close the arrestee is to the car and the timing of the search. Pet. Br. 28. Those factors may be key to determining whether an arrestee is a "recent occupant" of a vehicle under *Thornton* and whether a search is "contemporaneous" and incident to an arrest. But questions of proximity and temporality can be difficult to gauge.

As respondent documents, courts and officers struggle with assessing spatial and temporal proximity for the purpose of deciding whether an arrestee is a "recent occupant"—with inconsistent and unpredictable results. Resp. Br. 39-41. Indeed, "[s]ince *Thornton*, federal and state courts have been sharply divided over what distance constitutes sufficient spatial proximity between the arrestee and the vehicle for the arrestee to be considered a recent occupant * * * ." *United States v. Caseres*, No. 06-50546, 2008 WL 2841159, at *5 (9th Cir. July 21, 2008). There is no standard measure of temporal proximity either. *See id.* at 18. And the fact-specific determinations that are required to determine "how recent is recent, or how close is close," *Thornton*, 541 U.S. at 636 (Stevens, J., dissenting), have now resulted in Fourth Amendment case law regarding searching of vehicles incident to arrest that "reads something like, 'well, thirty-minutes is too long, but five minutes is okay and you can delay if you are filling out paperwork but not if you are interrogating or transporting the defendant.'" *United States v. McLaughlin*, 170 F.3d 889, 895 (9th Cir. 1999) (Trott, J., concurring).

Consequently, in practice, petitioner's automatic vehicle search rule is no "brighter" than a Fourth Amendment rule that prohibits the automatic search of a vehicle after the suspect has been arrested and secured and that requires, instead, that well established Fourth Amendment reasonableness standards such as probable cause or exigent circumstances be met. Indeed, the latter rule is more straightforward and likely easier for officers to implement.

CONCLUSION

For the reasons set forth above, and in respondent's brief on the merits, the Court should affirm the judgment of the Arizona Supreme Court.

Respectfully submitted,

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JULY 25, 2008

Total Assaults on Law Enforcement Officers

	United States	MA	NV	NM	NY	OR	PA	WY
1992	81150	1421	241	857	6486	690	2985	117
1993	62933	1343	180	558	5780	468	1902	82
1994	64967	1119	235	308	4745	567	2349	53
1995	57762	1085	250	671	2652	355	1825	60
1996	46608	851	295	307	4757	467	1749	52
1997	52149	825	346	608	4621	527	1742	59
1998	60673	744	454	535	4054	422	2471	54
1999	55971	518	467	503	1452	506	2603	50
2000	58398	522	509	538	1464	496	2817	49
2001	57463	1313	447	474	1101	412	2553	53
2002	59526	337	467	571	451	354	2374	74
2003	58600	510	477	436	899	409	2339	60
2004	59692	172	457	672	705	322	2631	57
2005	57820	147	466	806	722	373	2702	61
2006	59396	168	602	713	604	351	2899	58

Table drawn from unpublished data collected by FBI as part of the Uniform Crime Reporting Program. Published summaries of assault data appear in the FBI's annual report, *Law Enforcement Officers Killed and Assaulted*, available at www.fbi.gov/ucr/ucr.htm#leoka.

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Assaults on Law Enforcement Officers During Traffic Stops and Pursuits

	United States	MA	NV	NM	NY	OR	PA	WY
1992	7248	90	19	97	289	65	304	6
1993	5511	58	6	62	251	44	203	3
1994	5766	80	12	77	207	69	232	3
1995	5780	71	22	180	144	44	179	3
1996	4321	70	14	69	210	53	199	4
1997	5118	52	24	70	221	48	157	6
1998	6387	49	57	99	208	47	293	4
1999	6380	39	39	86	159	64	303	4
2000	6499	33	41	74	160	40	372	3
2001	6501	107	56	97	128	42	297	3
2002	6667	29	61	93	24	43	320	4
2003	6521	37	60	85	108	47	280	2
2004	6602	19	53	110	82	34	207	2
2005	6405	15	54	127	83	37	253	6
2006	6581	16	98	96	91	39	256	3

Table drawn from unpublished data collected by FBI as part of the Uniform Crime Reporting Program. Published summaries of assault data appear in the FBI's annual report, *Law Enforcement Officers Killed and Assaulted*, available at www.fbi.gov/ucr/ucr.htm#leoka.

Number of Law Enforcement Officers

	United States	MA	NV	NM	NY	OR	PA	WY
1992	456177	7642	2563	2010	46818	3863	17262	1137
1993	424054	9793	2540	1537	43553	3681	14394	858
1994	469426	10216	3166	1468	45450	4146	14579	934
1995	428379	11381	2880	2267	55200	4090	8064	951
1996	371964	8828	3464	1397	54242	5007	14429	849
1997	411015	12746	3747	2113	53398	4258	12502	987
1998	452361	11675	3847	2672	56430	4695	15249	903
1999	462782	12903	4123	3247	18146	4704	16896	1057
2000	452531	5615	4433	2488	17565	3734	15937	1039
2001	471096	10509	4096	2208	14781	3894	16183	1055
2002	491009	3852	3678	2797	17869	3423	18584	1050
2003	501738	12727	4002	1960	17493	3938	18112	1111
2004	501462	3663	4372	3593	23606	4222	17908	1077
2005	489393	3572	4299	3575	23283	3557	18121	1077
2006	504147	3294	5113	2532	22500	3785	18331	1110

Table drawn from unpublished data collected by FBI as part of the Uniform Crime Reporting Program. Published summaries of assault data appear in the FBI's annual report, *Law Enforcement Officers Killed and Assaulted*, available at www.fbi.gov/ucr/ucr.htm#leoka.

AMICUS CURIAE BRIEF

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No. 07-542

IN THE
Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

RODNEY JOSEPH GANT,

Respondent.

On Writ of Certiorari to the Arizona Supreme Court

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF PETITIONER

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Amicus curiae National Association of Police Organizations, Inc., respectfully moves for leave of Court to file the accompanying brief under Supreme Court Rule 37.3(b). Counsel for petitioner has consented to the filing of this brief and written consent has been filed with the Clerk of the Court; counsel for respondent has withheld consent. The Court previously granted leave to file *amicus curiae*'s brief in support of the petition for certiorari.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Police Organizations (NAPO) is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action and education.

Founded in 1978, NAPO is now the strongest unified voice supporting law enforcement officers in the United States. NAPO represents more than 2,000 police unions and associations, 238,000 sworn law enforcement officers, 11,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

The decision of the Arizona Supreme Court, holding that officers violate the Fourth Amendment by conducting a vehicle search incident to the lawful custodial arrest of a criminal suspect if they first take

the safety precaution of securing the arrested person in a police car, adversely affects the interests of our members by establishing a precedent that compromises safety procedures and eliminates clear and unequivocal guidelines for law enforcement officers on the streets.

For these reasons, *amicus curiae* respectfully requests that the Court grant leave to file this brief.

April, 2008

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER*

SUMMARY OF ARGUMENT

BECAUSE OF THE IMPERATIVES OF OFFICER SAFETY AND THE NECESSITY FOR PRACTICAL CONSTITUTIONAL GUIDELINES, THE FOURTH AMENDMENT DOES NOT REQUIRE LAW ENFORCEMENT OFFICERS TO DEMONSTRATE A THREAT TO THEIR SAFETY IN ORDER TO JUSTIFY A WARRANTLESS VEHICULAR SEARCH INCIDENT TO ARREST CONDUCTED AFTER THE VEHICLE'S RECENT OCCUPANTS HAVE BEEN ARRESTED AND SECURED.

ARGUMENT

I. CONSIDERATIONS OF OFFICER SAFETY JUSTIFY A BRIGHT-LINE RULE ALLOWING WARRANTLESS VEHICLE SEARCHES INCIDENT TO A RECENT OCCUPANT'S ARREST AND CONFINEMENT.

"By its terms, the Fourth Amendment forbids only 'unreasonable' searches and seizures." *Segura v. United States*, 468 U.S. 796, 806 (1984). According to the Arizona Supreme Court majority, the contemporaneous police search of respondent's vehicle incident to his lawful custodial arrest became unreasonable under the Fourth Amendment only

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* No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

because arresting officers first took the precaution of handcuffing respondent and securing him in a police car before conducting the search. Had respondent remained unsecured during the search, the same search would not have been unreasonable, according to the opinion below, because the interior of the vehicle would have remained within respondent's actual control. *State v. Gant,* 216 Ariz. 1, 6 (2007). In short, to insure the constitutional reasonableness of a vehicle search incident to arrest in Arizona, officers must not take reasonable precautions for their own personal safety. This ruling is perilously inverted.

Law enforcement work, never particularly safe, has unfortunately become even more dangerous to the men and women who enforce our social contract at great personal risk. According to the National Law Enforcement Officers Memorial Fund, 186 officers died in the line of duty in the United States in 2007. That tragic figure represents a 28% increase over the previous year and was the highest number of police fatalities in 18 years (except for 2001, when 72 officers died while responding to terrorist attacks). Some 60,000 additional officers are assaulted on the job each year.
http//www.nleomf.com/TheMemorial/Facts/2007_EndofYear.pdf.

The FBI Uniform Crime Reports summary of officers killed and assaulted on duty in 2006 (latest year reported) shows that 42% of attacks occurred while officers were conducting traffic stops or making arrests. http//www.fbi.gov/ucr/killed/2006/index.html. The Court has previously noted the inherent dangers

confronting officers during such encounters. *Pennsylvania v. Mimms,* 434 U.S. 106, 110 (1977) (observing that 30% of shootings of officers occurred when an officer approached a person in an automobile).

As the Court has acknowledged, "Certainly, it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry v. Ohio,* 392 U.S. 1, 23 (1968). Given the hazardous nature of police work in general and of arrests from vehicles in particular, it would be unreasonable to require police officers to take the unnecessary risk of a deadly attack by an unsecured arrestee during a vehicle search incident to arrest.

In support of its conclusion that the search of respondent's vehicle was unreasonable, the court below maintained that officers could simply forego a search after electing to secure the arrestee. *State v. Gant, supra,* 216 Ariz. at 6, ¶ 22. While this proposition is true, it hardly answers the question of whether the Fourth Amendment *requires* officers to choose between taking safety precautions and carrying out their charge to see that the laws are faithfully enforced. In any number of situations, police *could* concentrate solely on protecting themselves while ignoring their law enforcement responsibilities, but such exclusive choices would not serve the public safety interest in the enforcement of the criminal laws, and a choice from such alternatives is not commanded by the Fourth Amendment's mandate of reasonableness.

The restraints already imposed on investigative initiative are many and substantial. They include constitutional limitations, exclusionary rules, state laws, departmental policies and the potential for civil liability, criminal prosecution and administrative discipline. These constraints take a heavy toll on public safety: according to the 2006 Uniform Crime Reports, average national clearance rates for reported crimes of violence (murder, rape, robbery and aggravated assault) were only 44.3%; property crimes (burglary, theft and motor vehicle theft) were cleared in only 15.8% of reported cases. http//www.fbi.gov/ucr/cius2006/offenses/clearances/index.html. These are not statistics that cry out for the added investigative inhibition that would surely result from forcing officers to choose surviving over searching.

II. CONSIDERATIONS OF PRACTICALITY JUSTIFY A BRIGHT-LINE RULE ALLOWING WARRANTLESS VEHICLE SEARCHES INCIDENT TO A RECENT OCCUPANT'S ARREST AND CONFINEMENT.

The Arizona Supreme Court majority rejected the bright-line rule of *New York v. Belton,* 453 U.S. 454 (1981) and *Thornton v. United States,* 541 U.S. 615 (2004), insisting instead that whether or not police officers could search a vehicle incident to a recent occupant's arrest should be determined case-by-case, based on a retrospective evaluation of the circumstances of each particular situation. This ruling is wrong, for at least two reasons.

First, because the Arizona Supreme Court's ruling was based exclusively on the Fourth Amendment, that court was not at liberty to disregard the clear language of *Belton* and *Thornton,* which enunciated a rule (upon which police have long relied) that the passenger compartment of an arrestee's recently-occupied vehicle could be contemporaneously searched, incident to a lawful, custodial arrest, without inquiring into the particular level of danger facing the officer. *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("[A] State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."); *accord, Arkansas v. Sullivan,* 532 U.S. 769, 772 (2001).

Second, this Court has explained that the Fourth Amendment "reasonableness" calculation cannot always require case-specific appraisals, because of the need for sensible guidelines that can be understood and applied by police officers in the field, in confrontations that are often, if not always, fraught with potential danger:

> "[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. [Citation.] Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be

> applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules. [Citing *Belton.*] ('Fourth Amendment rules "ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged" and not "qualified by all sorts of ifs, ands, and buts".')"

Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001)

This Court has already generalized, in *Belton* and *Thornton,* that the passenger compartment of a recently occupied vehicle is an area that is inherently within the control of a recent occupant who has been arrested; this generalization substitutes for the case-specific inquiry the Arizona court thought necessary under *Chimel v. California,* 395 U.S. 752 (1969). There is no necessity for examination of the facts of each particular arrest situation, because *Belton* and *Thornton* shaped a rule that searches of the passenger compartment incident to the arrest of a recent occupant are *per se* reasonable. "That we typically avoid *per se* rules concerning searches and seizures does not mean that we have always done so." *Maryland v. Wilson,* 519 U.S. 408, 413, n. 1. Such bright-line rules are susceptible of clear and easy application by officers in the field and by trial and reviewing courts; the rule announced by the Arizona Supreme Court is not.

A computerized search of the Supreme Court database using the key words "Fourth Amendment" results in 770 case citations. Searches for "*Miranda v. Arizona*," "*Massiah v. United States*," "involuntary confessions" and "eyewitness identification" add another 514 cases. Though some of the citations overlap, if the rules and exceptions of these 1284 decisions affecting everyday police functions were the only things that police officers had to know, understand and remember, it would still prove a daunting challenge. Law enforcement officers, like other citizens, are not generally possessed of a recent law degree and photographic memory, nor does the Fourth Amendment require that they be so. Our nation's officers face an already challenging task in learning, knowing and remembering the many rules and exceptions that control their enforcement and investigative activities. They surely do not need to have the bright-line rule of *Belton* and *Thornton* replaced with an amorphous contingency.

Each of the several exceptions to the general warrant requirement of the Fourth Amendment has been carefully defined over many years, and in many cases: Searches of "fleeting targets" require probable cause and lawful access, *United States v. Ross*, 456 U.S. 798 (1982); consent searches require voluntary permission from one with uncontested authority, *Georgia v. Randolph*, 547 U.S. 103 (2006); emergency searches are justified by the need to neutralize exigencies, *Brigham City, Utah, v. Stuart*, 547 U.S. 398 (2006); searches incident to contemporaneous arrest require a lawful, custodial arrest, *Agnello v.*

United States, 269 U.S. 20 (1925); officer safety searches require an articulable suspicion of danger, *Terry v. Ohio, supra*, 392 U.S. 1; and some searches are made reasonable by distinct "special needs," *New Jersey v. T.L.O.,* 469 U.S. 325 (1985).

What the majority opinion below attempts to do is to conflate the exception for searches incident to arrest with the exception for officer safety, by requiring officers to justify vehicle searches incident to arrest with articulable suspicion of actual danger, case-by-case. But if officers were able to point to specific facts as independent justification for searching an arrestee's vehicle for weapons, there would be no need to invoke the separate exception for searches incident to arrest. *Michigan v. Long,* 463 U.S. 1032, 1049 (1983). The navigation of Fourth Amendment jurisprudence is quite challenging enough for police officers; erecting a new obstacle by confusing the justification standards for two discrete exceptions for warrantless searches does nothing to insure constitutional reasonableness.

CONCLUSION

The Fourth Amendment guarantees security against *unreasonable* searches and seizures. Because it is not unreasonable to permit law enforcement officers to take the safety precaution of securing an arrestee before conducting a contemporaneous search of his recently-occupied vehicle, the judgment of the Arizona Supreme Court should be reversed.

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